Settling WTO Disputes: What Do Litigation Models Tell Us?

AMELIA PORGES*

I. INTRODUCTION

The court-like aspects of dispute settlement in the World Trade Organization (WTO)—the mighty court of world trade backed up by the big stick of trade sanctions—have been lauded as one of the its major successes. For better or for worse, these successes have been described as an "Americanization" of the dispute settlement process that was handed down from the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT).[1] But WTO dispute settlement in this sense may have been too successful for some of its supporters, even those in the United States. After an initial period of euphoria, the tide has shifted to cases the results of which are harder for the United States to digest and which have affected how the United States uses trade remedy statutes.[2] In 1988, ensuring more effective multilateral dispute settlement and enforcement was the number one U.S.

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* Amelia Porges is an attorney with Sidley Austin Brown & Wood LLP, Washington, DC, and formerly was Senior Counsel for Dispute Settlement, USTR, and Senior Legal Officer, GATT Secretariat. The views reflected in this Article are personal and should not be read as reflecting the views of any of these organizations. I thank Scott Andersen, Marc Busch, Patricia McCoy, David Schutz, Andrew Shoyer, and Joel Trachtman for their comments and criticism, and I thank Scott Andersen, Andrew Shoyer, and my former colleagues at USTR for the practical experiences reflected herein. I am greatly indebted to Robert Hudec, whose work and presence in this area will be greatly missed.

[1] World Trade Organization (WTO) and General Agreement on Tariffs and Trade (GATT) documents are cited throughout this Article. WTO documents can best be accessed on the WTO website at http://docsonline.wto.org/gen_search.asp?searchmode=simple using either the title or the document number. GATT documents cited herein can similarly be located on the WTO website. Citations to the GATT Basic Instruments and Selected Documents (B.I.S.D.) are provided for GATT documents only.

[2] In the case of *United States—Tax Treatment for "Foreign Sales Corporations,"* five rounds of litigation led to authorization for the European Communities (EC) to impose trade sanctions eliminating $4 billion a year in U.S. exports. *See* WTO, *United States—Tax Treatment for "Foreign Sales Corporations"—Recourse by the European Communities to Article 4.10 of the SCM Agreement and Article 22.7 of the DSU*, WT/DS108/26 (Apr. 25, 2003) (approved by Dispute Settlement Body (DSB) May 7, 2003); *see also* WTO, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/14 (Jun. 30, 2003) [hereinafter *Update*]. Now that the dispute settlement system has succeeded in smoothly processing the biggest-stakes case ever in the GATT or the WTO, the EC and the United States are faced with finding a way to avoid the huge burden presented by trade sanctions on such a scale.

negotiating objective for the Uruguay Round of GATT negotiations.[3] In 2002, Congress's major priority for dispute settlement was fixing recent WTO decisions on trade remedies.[4] The Bush administration, tasked with coming up with a response, has proposed changing the WTO rules to facilitate settlement of disputes by negotiation and agreement.

This Article looks at the role of negotiation in WTO dispute settlement, addressing the question: Why aren't more of these disputes settled between the parties? The approach taken is both descriptive and theoretical. It starts with a survey and "thick description"[5] of consultations and negotiation in WTO dispute settlement, with examples that illustrate how litigating governments and stakeholders approach such negotiations and why they have chosen to litigate or settle in particular cases. The Article then discusses some of the models used to analyze litigation and settlement in domestic courts and what they could tell us about WTO dispute settlement.

Insights from the rich literature on economic analysis of litigation and settlement in domestic courts may be usefully brought to bear on WTO disputes and may provide guidance regarding the likely effect of possible changes in the WTO dispute settlement rules. In a domestic setting, typically ten cases settle out of court for each one that is tried.[6] The settlement rate in the WTO is much lower: in the first five years of the WTO, 52% of formal complaints under the WTO dispute settlement procedures resulted in establishment of a panel to adjudicate the dispute, and 35% of complaints resulted in a panel ruling.[7] What differences between the two settings matter in explaining the difference in settlement rates?

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[3] *See* Omnibus Trade and Competitiveness Act of 1988 § 1101(b)(1), 19 U.S.C. § 2901 (2000).

[4] *Compare id.* (providing U.S. principal trade negotiation objectives for the Uruguay Round, led by dispute settlement) *with* Trade Act of 2002 § 2101(b)(3), 19 U.S.C. § 3801 (2000 & Supp. 2002) (not including dispute settlement as such in principal trade negotiating objectives and including a congressional finding that "[s]upport for continued trade expansion requires that dispute settlement procedures under international trade agreements not add to or diminish the rights and obligations provided in such agreements").

[5] Clifford Geertz, *Thick Description: Towards an Interpretative Theory of Culture*, *in* THE INTERPRETATION OF CULTURES 3–30 (1973).

[6] Robert Cooter & Daniel Rubinfeld, *Economic Analysis of Legal Disputes and their Resolution*, 27 J. ECON. LITERATURE 1067, 1070 (1989) (citing Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 44 n.1 (1983)).

[7] Marc Busch & Eric Reinhardt, *The Evolution of Dispute Settlement*, *in* TRADE POLICY RESEARCH 144, 151 (John M. Curtis & Dan Ciuriak eds., 2003).

The empirical analysts of WTO dispute settlement, Marc Busch and Eric Reinhardt, find that settlement before a panel ruling yields the best outcomes, that the change to the new, improved WTO dispute settlement rules has made such settlement less likely, not more, and that failure to reach early settlements in disputes particularly harms developing countries.[8] If settlement by negotiation and agreement is a socially desirable goal in itself, what changes in the rules could help the parties to WTO disputes get to settlement? The objective is to present both a real-world discussion that provides useful data for the development of theory and a theoretical discussion useful for the current debate.

II. NEGOTIATION IN WTO DISPUTES: AN OVERVIEW

Every WTO dispute starts as someone's commercial problem. The government becomes aware of the problem from a private stakeholder or otherwise. Unless it is evident that pre-WTO settlement talks will be fruitless, generally the first step for a government is to approach the government responsible for the problem, and request that the problem be removed. Thus, the dispute is launched with a negotiation, which the parties may continue during formal WTO dispute settlement consultations, during the panel process, through the end of the panel and appellate process, and afterwards.

A key characteristic of this negotiation is that it is most often a two-level negotiation.[9] While one negotiation takes place between the government

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[8] *Id.* at 145.

[9] Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-level Games*, 42 INT'L ORG. 427 (1988), *reprinted in* DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS 431–68 (Peter Evans et al. eds., 1994). Putnam's article analyzes the outcome of the 1978 Bonn Summit through examining the entanglement between domestic and international politics, characterized as a two-level game in which national leaders participate simultaneously in both international ("Level I") and domestic ("Level II") games. Putnam argues that the "win-set" size is particularly affected by preferences and coalitions in the Level II negotiation (such as the cost of no-agreement to domestic constituents, the homogeneity or heterogeneity of domestic interests, the breadth of participation in the domestic process of ratification of international agreements, and domestic issue linkage); by the nature of political institutions in each country; and by the strategies of Level I negotiators (exhibiting flexibility or tying their own hands). Putnam points out that Level I negotiators often have poor information about the other side's domestic constraints. All of these points have a certain resonance for settlement negotiations in WTO disputes, where information on the other side's domestic constraints is poor, the two sides are operating under time pressure, and the interaction between government negotiators and stakeholders can either doom a negotiation or create unique possibilities for cooperation. As Putnam observes,

representatives concerned, each of those representatives is simultaneously negotiating with the private stakeholders and other concerned domestic interests. Both levels of negotiation can be profoundly affected by domestic law: both laws targeted at international disputes such as Section 301 of the Trade Act of 1974,[10] and regulatory statutes such as antidumping or health and safety regulations. In this negotiation, government and stakeholders often have different time horizons and different objectives. A business stakeholder typically wants a prompt solution to its market problem; governments may have the time and resources to do one or a chain of test cases in the WTO to obtain legal rulings to serve larger trade policy objectives. The EC Commission,[11] for instance, brought a series of WTO disputes concerning the WTO Agreement on Safeguards, starting in 1997. The disputes concerned export markets of little or no commercial concern to European exporters, such as the Korean market for powdered milk;[12] the very lack of stakeholder interest left Commission litigators with a free hand to target their arguments.[13] In contrast, the later stages of the *Bananas* litigation in the

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sometimes "clever players will spot a move on one board that will trigger realignments on other boards, enabling them to achieve otherwise unattainable objectives." *Id.* at 437.

[10] Section 301 of the Trade Act of 1974 delegates authority to the U.S. Trade Representative (USTR) (originally to the President) to take retaliatory action, including tariff increases, import restrictions or denial of service sector access authorizations, against violations of trade agreements by a foreign country or the EU, and "unjustifiable," "unreasonable," or "discriminatory" practices that burden or restrict U.S. commerce. Trade Act of 1974 § 301, 19 U.S.C. § 2411 (2000). Any interested person may file a petition with the USTR under section 302 raising a claim and requesting that such action be taken; claims now generally concern violations of the WTO Agreement. Trade Act of 1974 § 302. If the USTR accepts the petition, he or she "initiate[s] an investigation." *Id.* The statutory scheme is based on precommitment to time limits. For instance, if the issues are covered by a trade agreement and are not resolved within its consultation period or 150 days, whichever is earlier, the USTR must promptly request proceedings under the agreement's "formal dispute settlement procedures." Trade Act of 1974 § 303(a)(2). Section 301 also *requires* the USTR to take action against trade agreement violations in certain circumstances. Trade Act of 1974 § 301(a).

[11] This Article refers to the EC because the EC is the international organization that signed and accepted the WTO Agreement and is a Member of the WTO; the European Union, created as a vehicle for further cooperation between the member states of the EC, is not endowed with international legal personality. This Article uses the word "government" to include the EC Commission.

[12] Panel Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R at para. 7.8 (Jan. 12, 2000).

[13] These cases built the WTO jurisprudence on "unforeseen developments" and the continuing application of Article XIX:1 of the GATT 1994 to safeguards measures, and was criticized in ALAN SYKES, THE SAFEGUARDS MESS: A CRITIQUE OF WTO JURISPRUDENCE (U. CHI. L. & ECON. Olin Working Paper No. 187), *at*

WTO took place under a timetable agreed by the White House under pressure from congressional leaders who had met with the most active U.S. stakeholder company.[14]

One overwhelming fact affects negotiation and all other aspects of a WTO dispute: the remedies provided by the WTO do not include monetary compensation to stakeholders, governments, or any party for past damage caused by rule violations. Under Article 19.1 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (the "Dispute Settlement Understanding," or "DSU"), when a panel or the Appellate Body concludes that a measure is inconsistent with the WTO Agreement, "it shall recommend" that the losing defending party "bring the measure into conformity with that agreement." Compliance of this nature is essentially prospective only. It is often cost-free for the defending government and its stakeholders to delay, or to insist on the full extent of time-consuming procedural niceties, even (or particularly) in cases where the measure concerned is obviously WTO-illegal. As a corollary, even a large and powerful complaining party representing a stakeholder has a powerful incentive to seek a solution through negotiation and compromise, in the interests of achieving a solution in the near term and not after two or more years of WTO litigation.

Each dispute has both outputs and outcomes.[15] The outputs of a dispute are the findings and recommendations in the panel decision, plus the Appellate Body decision if an appeal is pursued; yet they are only one step on the way to the outcome at the end of the story. These decisions serve to "clarify the existing provisions of [the WTO] agreements in accordance with customary rules of interpretation of public international law," but do not add to or diminish the obligations of governments under those agreements.[16] To the extent that these decisional outputs are consistent, credible, and build the reputation of the WTO panel and appellate process, they provide useful guidance, and will affect bargaining positions, bargaining leverage, and the commercial outcomes which are generally the major interest of stakeholders.

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http://ssrn.com/abstract_id=415800.

[14] *Administration Yields to Demands for Action Against EU on Bananas*, INSIDE U.S. TRADE, Oct. 16, 1998 (discussing actions of Chiquita Brands International). A list of the actions taken appears in Implementation of WTO Recommendations Concerning the European Communities Regimes for the Importation, Sale and Distribution of Bananas, 64 Fed. Reg. 19,209–19,211 (Apr. 19,1999).

[15] "Outcome" here is used in the same sense as "substantive outcome" in ROBERT HUDEC, ENFORCING INTERNATIONAL TRADE LAW 276 (1993).

[16] WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, art. 3.2 [hereinafter DSU], *available at* http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#Top.

However, the outputs in WTO disputes almost always permit more than one possible compliance outcome, and so negotiation matters. Article 19 of the WTO's canon of dispute settlement procedure, the Dispute Settlement Understanding, limits panels and the Appellate Body to recommending that a sinner bring itself into compliance, and bars them from specifying how this is to take place.[17] As a result, neither panels nor the WTO can impose a particular dispute outcome. Unless the losing party determines its compliance path unilaterally, the outcome has to be negotiated.[18] For example, when a WTO arbitration panel examined the trade damage caused by the EC's failure to comply with WTO obligations in the *Banana* dispute, the panel recognized there were multiple compliance paths possible and picked one as a reasonable benchmark for comparison.[19] In the end, the EU, the United States and Ecuador arrived at yet another answer, a solution that was hybrid, heterodox, and determined by negotiation.[20]

Some outcomes will benefit a stakeholder in the complaining party more, some will benefit it less, and some will not benefit the stakeholder at all. The two WTO disputes on taxes on distilled spirits in Japan[21] and Korea[22] demonstrate this point. Both Japan and Korea were required to eliminate de facto discrimination against imported spirits in their excise taxes. Japan's compliance path led to a large tax-cut on the premium whisky sold by foreign

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[17] *Id.* at art. 19.

[18] *See id.* at art. 19.1.

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned [i.e., the losing party] bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

Id. The compliance obligations of WTO Members under DSU Article 21 relate to the "recommendations and rulings" in a panel or Appellate Body report that has been adopted by the WTO Dispute Settlement Body, the WTO body that administers the DSU. *Id.* at art. 21.

[19] WTO, Decision by the Arbitrators, *EC-Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the EC under Article 22.6 of the DSU*, WT/DS27/ARB at para. 7.7 (Mar. 24, 2000). The parties to the arbitration focused on four base "counterfactual" compliance scenarios. *Id.* at para. 7.4–7.5.

[20] WTO, *EC-Regime for the Importation, Sale and Distribution of Bananas—Notification of Mutually Agreed Solution*, WT/DS27/58 (Jul. 2, 2001).

[21] WTO, Panel Report and Appellate Body Report, *Japan—Taxes on Alcoholic Beverages* (hereinafter "*Japan Taxes*"), WT/DS8/R and WT/DS8/AB/R (Nov. 1, 1996).

[22] WTO, Panel Report and Appellate Body Report, *Korea—Taxes on Alcoholic Beverages* (hereinafter "*Korea Taxes*"), WT/DS75/R and WT/DS75/AB/R (Feb. 17, 1999).

exporters (and domestic producers); Korea's did not.[23] After Korea complied with the letter of its legal obligations, the tax per bottle of premium imported whisky was still much higher than the tax on a bottle of Korean *soju*, and foreign stakeholders had not solved their market access problem.

One final general consideration should be noted: the role of information in WTO disputes. In a dispute where facts are important, gathering the necessary facts and putting together the arguments can take months of effort. Information that is taken for granted or easily discoverable in domestic litigation is not necessarily easy to get when it concerns actions taken in a foreign legal system.[24] The WTO legal obligations are not always clear, and key information on possible choices for WTO-consistent implementation may be unavailable until a point well after a government or a stakeholder has committed resources to a case.

So every WTO dispute takes place between two negotiations: one negotiation that has failed to produce compliance and another negotiation on securing compliance after the dispute settlement process is over. It is negotiation that will determine which of the range of possible outcomes emerges from a WTO dispute, and when. Although the deadline for compliance may be set by arbitration, if the losing party has not complied by the deadline, the winning party will again be reduced to negotiating for compliance or compensation unless it prefers retaliation. The role of negotiation is generally underestimated—in part due to the paucity of information available on dispute outcomes.[25] But it is often negotiation that makes all the difference in determining the outcome at the end of the day.

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[23] WTO, *Japan—Taxes on Alcoholic Beverages, Mutually Acceptable Solution on Modalities for Implementation*, WT/DS8/17 (Jul. 30, 1997) and WT/DS8/17/Add.1 (Jan. 12, 1998) (EC-Japan agreement); WTO, *Japan—Taxes on Alcoholic Beverages, Mutually Acceptable Solution on Modalities for Implementation*, WT/DS8/19 (Jan. 12, 1998) (Japan-U.S. agreement); WTO, *Japan—Taxes on Alcoholic Beverages, Mutually Acceptable Solution on Modalities for Implementation*, WT/DS8/20 (Jan. 12, 1998) (Canada-Japan agreement); WTO, *Korea—Taxes on Alcoholic Beverages, Status Report by Korea*, WT/DS75/18 (Jan. 17, 2000).

[24] *See* discussion *infra* Part IV.F. regarding discovery of facts.

[25] Full information exists on dispute outputs, in the form of the panel and Appellate Body reports published by the WTO and posted on its Internet site. However, relatively little organized information exists on the details of outcomes. The appendix to Prof. Robert Hudec's ENFORCING INTERNATIONAL TRADE LAW (1993), *supra* note 15, provides narrative descriptions of outcomes for the GATT period, which have been coded as a dataset by Eric Reinhardt. Eric Reinhardt, Posturing Parliaments: Ratification, Uncertainty and International Bargaining, ch. 4 (1996) (unpublished Ph. D. dissertation, Columbia University), *at* http://userwww.service.emory.edu/~erein/data/. Prof. Reinhardt and Prof. Marc Busch have produced a dataset for all disputes under the GATT and many WTO disputes with outcomes coded with the cooperation of Prof. Robert Hudec. *See*

III. NEGOTIATION IN GATT AND WTO DISPUTES: LEGAL SETTING AND HISTORICAL BACKGROUND

The WTO dispute settlement process is based on the dispute settlement provisions of the GATT,[26] which provide for third-party settlement of bilateral trade disputes if the complaining party has first tried and failed to settle the dispute directly. The first paragraph of Article XXIII gives any GATT contracting party the right "with a view to the satisfactory adjustment of the matter, [to] make written representations or proposals to the other contracting party or parties which it considers to be concerned."[27] The target of such a request must give "sympathetic consideration to the representations or proposals made to it."[28] Each GATT contracting party has both a right to initiate consultations and a duty to consult upon request.[29] The second paragraph provides that if the parties do not reach a "satisfactory adjustment" within a reasonable time, the "matter" can be referred to the collective decision process in the GATT; after a prompt investigation, the GATT "acting jointly" is to make "appropriate recommendations" to those concerned, or give a ruling.[30] Finally, if the GATT considered that the circumstances were "serious enough to justify such action," it could authorize a contracting party or parties to "suspend concessions"—giving the legal right to impose trade retaliation—selectively against the sinner.[31]

As Robert Hudec's work has discussed in depth, GATT began handling disputes at its inception and by 1949 had developed the practice of referring

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Marc Busch & Eric Reinhardt, *Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement*, *in* DISPUTE PREVENTION AND DISPUTE SETTLEMENT IN THE TRANSATLANTIC PARTNERSHIP (Ernst Ulrich Petersmann & Mark Pollack eds., forthcoming 2004), *available at* http://www.law.berkeley.edu/cenpro/ils/publications.html. However, no comprehensive description of outcomes exists for all WTO disputes.

[26] General Agreement on Tariffs and Trade, Oct. 30, 1947, arts. XXII & XXIII, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm [hereinafter GATT].

[27] *Id.* at art. XXIII:1.

[28] *Id.*

[29] *Id.* at art. XXII.

[30] *Id.* at art. XXIII. Article XXIII refers to action by the "CONTRACTING PARTIES." Article XXV:1 of the GATT defines "CONTRACTING PARTIES" as "the contracting parties acting jointly." This orthographic convention was invented in order to provide a basis for the Truman Administration to deny it was agreeing to creation of a new international organization. SUSAN AARONSON, TRADE AND THE AMERICAN DREAM: A SOCIAL HISTORY OF POSTWAR TRADE POLICY 69–72, 82–83 (1996); THOMAS W. ZEILER, FREE TRADE, FREE WORLD: THE ADVENT OF GATT 74–84 (1999).

[31] GATT, *supra* note 26, at art. XXIII:2.

disputes under Article XXIII:2 to working parties. A working party is a negotiating body that includes the parties interested in an issue, that does its business by face-to-face interaction, and whose objective is agreement.[32] In the early years, almost all GATT business was conducted during month-long sessions that took place approximately annually.[33] Pushed by the GATT Secretariat, working parties began to act like third-party adjudicators, drawing up reports recording the views of the two disputing parties but treating the votes of the neutral members as dispositive.[34] Starting in 1952, the working party format mutated into a standing group of neutrals, which would hear complaints and then draw up its report in camera with Secretariat assistance.[35] Bit by bit, through small successes, the procedures gathered legitimacy and began to make a difference in persuading defending governments to remove problem measures. Dispute settlement was still a process conducted between repeat players in an occupational community,[36] and dependent on the defending party's cooperation.[37] Very many cases were settled bilaterally and only the hard-core cases were referred to panels.

These early years were followed by a 17-year period of decline from 1959 through 1975, attributed by Hudec to the strain put on the GATT rules by the new environment of the 1960s. The formation of the European Economic Community sparked a rise in preferential trade and a general breakdown in the rules against discrimination; empirical work has demonstrated that co-parties to a regional trade agreement were seven times less likely to bring a GATT dispute against each other.[38] Decolonialization and the rise in GATT's membership led to what Hudec characterizes as a

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[32] ROBERT HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 78 (Butterworth Legal Publishers 1989) (1975).

[33] See the list of sessions and dates in WTO, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 12–14 (6th ed. 1995) [hereinafter ANALYTICAL INDEX]. In 1960, the CONTRACTING PARTIES established a Council of Representatives (the "GATT Council"), and from 1968 until the end of the GATT in 1995, the Council handled almost all GATT business. *Id.* at 1100–01.

[34] HUDEC, *supra* note 32, at 80–81.

[35] *Id.* at 88–89.

[36] The Overview table at page 1144–45 of the ANALYTICAL INDEX, *supra* note 33, provides a snapshot of the size of the GATT community at any given time. Before 1960, for instance, there were only thirty-six contracting parties; as of 1977 there were seventy-seven, as of 1981 there were 85, and as of 1990 there were one hundred. *Id.*

[37] HUDEC, *supra* note 32, at 204–05.

[38] *Id.* at 216–17; Eric Reinhardt, Aggressive Multilateralism: The Determinants of GATT/WTO Dispute Initiation, 1948–1998, prepared for delivery at the 1999 Annual Meeting of the International Studies Association, Washington, DC, Feb. 17–20, 1999, *at* http://userwww.service.emory.edu/~erein/research/initiation.pdf.

"progressive delegalization of the relationship between GATT and its developing country members"[39] and developed countries in turn increased the use of quotas and other restrictions on developing country imports such as textiles. By the late 1960s, the GATT mainstream characterized dispute settlement as undesirable, unconstructive confrontation. In an environment in which most contracting parties were taking trade actions that were at odds with basic GATT rules, the mainstream preferred negotiation. The exceptions were, as Hudec points out, the developing countries and the United States: developing countries because of their belief in their normative legal claims, and because they were proposing rules that would only bind others; and the United States because it was the only major actor whose post-1960 trade policy had not moved away from the liberal model reflected in the 1947 GATT text.[40]

During this period, even panels pushed disputants into conciliation mode. For instance, in the *Dollar Banana* case of the early 1970s, the United States attacked United Kingdom import quotas that discriminated against bananas, citrus, rum, and cigars from the "dollar area" of the United States and Latin America. The panel issued an "interim" report which reviewed the commercial impact of the quota, noted that the United Kingdom had conceded that the quota violated GATT Article XI, "strongly requested the parties concerned to seek a mutually acceptable solution to the problem" that would take into account the dependence on the U.K. market of Caribbean citrus exporters, and set a deadline of a month for such a solution.[41] Two months later the parties notified the GATT Director-General that they had settled the case and that the United States had withdrawn its complaint.[42]

The outlines of GATT dispute settlement in its final form emerged during the Tokyo Round negotiations of the 1970s, the first time that dispute settlement itself was a topic of negotiation. The Tokyo Round produced both a set of non-tariff barrier codes with new, more automatic dispute settlement procedures, and a "framework agreement" consisting of a negotiated restatement of GATT practice in the area.[43] But as of 1980, the basic

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[39] HUDEC, *supra* note 32, at 229.

[40] *Id.* at 250.

[41] GATT, Interim Panel Report, *United Kingdom—Dollar Area Quotas*, Apr. 30, 1973, GATT B.I.S.D. (20th Supp.) at 230–36 (1973) [hereinafter *Dollar Banana* case].

[42] *Id.* at 236–37, para. 5; *see* HUDEC, *supra* note 32, at 259 (stating that the settlement provided a timetable for removing quotas on all the products directly of interest to the United States (i.e., citrus but not bananas)).

[43] GATT, Understanding on Notification, Consultation, Dispute Settlement and Surveillance, Annex on Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement, Art. XXIII:2, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 210 (1979).

elements of GATT dispute settlement remained the same as in 1952. A contracting party could refer a matter for investigation under GATT Article XXIII:2 but establishment of a working party, or of a panel, required a collective decision. When the panel process was completed and the panel had circulated a report proposing rulings and recommendations, those proposals had no official status until adopted by a collective decision. Finally, only a collective decision could authorize trade retaliation. While the GATT nominally provides for decisionmaking by vote with one vote per contracting party (and early disputes were decided by vote),[44] after 1957 no GATT decision was taken other than by consensus.[45] By blocking consensus, a defending party could prevent establishment of the panel, block adoption of an unfavorable panel report and block authorization of retaliation. Conditional threats to block could be used to obtain terms of reference for a panel proceeding that would limit the scope of the dispute[46] or provide special procedures to accommodate concerns of major players.[47] The specter of defendant blockage created a persistent reputation problem for GATT, captured in the House Ways and Means Committee's description of the reasons for enacting authority to retaliate unilaterally under Section 301:

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[44] See, for example, the Czechoslovak-U.S dispute on U.S. export controls, *discussed in* ANALYTICAL INDEX, *supra* note 33, at 602, decision in BISD Vol. II at 28, complaint rejected by roll-call vote 17-1 with 3 abstentions, GATT Doc. GATT/CP.3/SR.22.

[45] ANALYTICAL INDEX, *supra* note 33 at 1099. The literature on international organizations shows that particularly since the mid-1960s, consensus decisionmaking has become dominant in many organizations whose constitutions nominally provide for voting. *See* HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW §§ 783–85 (1999); C. Wilfred Jenks, *Unanimity, the Veto, Weighted Voting, Special and Simple Majorities and Consensus as Methods of Decision in International Organisations*, *in* CAMBRIDGE ESSAYS IN INTERNATIONAL LAW 48–63 (1965).

[46] *See e.g.*, GATT, Unadopted Panel Report, *U.S.—Trade Measures Affecting Nicaragua*, L/6053 paras. 5.1–5.3. The United States blocked the establishment of a panel to examine Nicaragua's GATT complaint against the 1985 U.S. trade embargo on Nicaragua. *Id.* The blockage was only lifted when Nicaragua consented to special terms of reference stating that "the Panel cannot examine or judge the validity or motivation for the invocation of Article XXI(b)(iii) by the United States." *Id.*

[47] The EEC used blockage of panel establishment to obtain rights of full participation for Mediterranean preference receiving countries in the *Citrus* dispute brought by the United States against the EEC in 1983. *See* Stmt. of Panel Chair, GATT Doc. C/M/168 (1983) at 5. The United States also used blockage to obtain full rights to participate in the EEC dispute against Japan's implementation of the U.S.-Japan agreement on semiconductor trade. *See* Document Detailing Panel Composition and Terms of Reference, GATT Doc. C/M/208 (1987), at 14.

> Your committee is particularly concerned that the decisionmaking process in the GATT is such as to make it impossible in practice for the United States to obtain a determination with respect to certain practices of our trading partners which appear to be clear violations of the GATT . . . . So long as decisions in the GATT are made on the basis of political consensus of the contracting parties, the United States will have no assurance that questions of consistency with the GATT will be resolved impartially. The committee believes that it is essential for the United States to be able to act unilaterally in any situation where it is unable to obtain redress through the GATT against practices which discriminate against or unreasonably impair U.S. export opportunities.[48]

There followed the turbulent 1980s, a decade in which the United States brought a series of high-profile legal complaints against the EEC, characterized by long delays in establishing the panel, protracted panel proceedings, panel reports widely considered to have quality problems, and blocking of adoption of panel reports. During the same period, as the dollar rose and rose, so did the volume of protectionist legislative proposals in Congress, with tacit backing from an exporting business community that had lost its patience. The pressure led to enactment in 1988 of "Super 301,"[49] an overlay on Section 301's investigation provisions that required the executive branch to compile a list of trade sinners in 1989 and 1990 and initiate Section 301 investigations against the trade barriers of each listed sinner. The same legislation mandated dispute settlement reform as the number one specific objective for the United States in the Uruguay Round.[50] The 1989 and 1990 Super 301 process, handled by an Administration steering gingerly between Congress and the GATT, still provoked a reaction so severe that it made Section 301 a major target in the Uruguay Round and helped turn the EC into a backer of multilateral dispute settlement.

The Uruguay Round finally produced the DSU, an agreement largely negotiated between the United States and the EU and within the "Quad"[51] countries, with important interventions by the developing countries. Binding third-party dispute settlement was an objective of many in the GATT, not just the United States. In 1989, as part of an "early harvest" of interim results from the Uruguay Round negotiations, the GATT Council approved an

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[48] H.R. REP. NO. 93-571, at 66–67 (1973), cited at HUDEC, *supra* note 32, at 262.

[49] 19 U.S.C. § 2420 (2000), *amended by* Pub. L. No. 100-418 (Aug. 23, 1988). This authority expired in 1990.

[50] Omnibus Trade and Competitiveness Act of 1988 § 1101(b)(1), 19 U.S.C. § 2901 (2000).

[51] Canada, EU, Japan and United States.

interim package of dispute settlement improvements,[52] which was put into force immediately on a provisional basis. The package gave any GATT contracting party the right to a panel to hear its complaint.

Negotiations then moved forward, resulting in 1991 in the key tradeoff that created the final WTO dispute settlement rules. The United States and others who wanted an effective dispute settlement process succeeded in gaining agreement to rules that eliminated blockage. Any party that could not settle a dispute after consultations could have the dispute referred to a panel by the Dispute Settlement Body (DSB), the body administering the DSU. This referral would take place unless there was consensus otherwise. The same "negative consensus" rule would apply to DSB decisions to adopt panel and Appellate Body reports and to authorize suspension of concessions upon request. In exchange for accepting this "automaticity"[53] in dispute settlement, the EC gained agreement to the text of DSU Article 23, curbing unilateral determinations condemning measures before completion of multilateral dispute settlement.

The final step was to link the dispute settlement rules with the new trade organization being created to administer the Uruguay Round agreements. The GATT dispute settlement system still provides the basic structure for WTO dispute settlement. The DSU rules govern dispute settlement procedure, but the elements of a claim (the cause of action) are provided by each of the covered agreements itself. And most of those agreements simply refer to the consultation and dispute settlement provisions of the GATT.[54]

The DSU text was not perfect; it could have been predicted that WTO litigants and panels would end up consuming much time and effort on issues the negotiators barely discussed, and vice versa. Negotiators were so aware of this fact that they built in a review of the DSU, and mandated that the review be carried out four years after entry into force of the new rules. The

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[52] GATT, Improvements to the GATT Dispute Settlement Rules and Procedures, Apr. 29, 1989, GATT B.I.S.D. (36th Supp.) at 61 (1989).

[53] U.S. negotiators' attempts to remove collective decisionmaking from the process (for instance, by having a panel started by filing a request, as in court) had met with no sympathy.

[54] *See e.g.*, WTO, Agreement on Safeguards, art. 14, *at* http://www.wto.org/ english/ tratop_e/safeg_e/safeint.htm (SG Agreement) ("The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and settlement of disputes arising under this Agreement."). This formula is used in the new agreements drafted in the Uruguay Round—except for the General Agreement on Trade in Services, the provisions on textile disputes in the Agreement on Textiles and Clothing, and the special remedy provisions for prohibited and actionable subsidies in the Agreement on Subsidies and Countervailing Measures. The covered agreements that existed before the Uruguay Round generally retained their pre-existing cause-of-action provisions.

DSU review then took place between 1997 and 1999, ending at the Seattle Ministerial Meeting of 1999. The Ministerial Declaration of November 2001, which launched the Doha Development Agenda talks, then provided for renewed negotiations on dispute settlement with a deadline of May 31, 2003,[55] which has now been extended until May 31, 2004.[56]

IV. NEGOTIATION IN PRACTICE: BEFORE, DURING AND AFTER A WTO DISPUTE

We turn now to a description of the role of settlement negotiations in a typical WTO dispute. This picture is intended to provide a material basis for the discussion of models below.

A. *Dispute Types*

WTO disputes, like GATT disputes, can be divided into two types: stakeholder cases and policy cases.[57] Most disputes are focused on particular products, and often involve specific stakeholder interests whose primary focus is on commercial outcomes. Some are essentially government-initiated, may be brought against a measure without reference to its product impact, and are motivated by issues of principle; the government may have as its objective the establishment of a legal precedent rather than any particular commercial outcome. The structure and dynamics of negotiations and settlement will obviously differ depending on which type of dispute is involved. Even in a product-focused dispute, only the government can initiate formal WTO dispute proceedings, and the government is ultimately responsible for all arguments presented. The government may act both as an agent of a stakeholder principal and as a principal itself; in a government-initiated dispute there may be no private stakeholder and thus agent and principal merge.

For a stakeholder focused on market access, the most important fact is the lack of compensation to stakeholders for past damage in the WTO. Stakeholder complaints may be of any size, and many are surprisingly small. The only requirement is that they are important *enough* to someone who is

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[55] WTO, Ministerial Declaration of November 2001, WT/MIN(01)/DEC/1, at para. 30 (Nov. 20, 2001).

[56] Daniel Pruzin, *WTO Members Formally Endorse Deadline Extension for Dispute Talks*, DAILY REP. FOR EXECUTIVES (BNA), Jul. 29, 2003, at A4.

[57] HUDEC, *supra* note 32, at 103–05 (noting the same pattern in GATT disputes brought during the 1950s).

important enough.[58] In such cases, the litigating government may be dependent on the stakeholder for information necessary to frame the legal complaint and target settlement negotiations. Settlement discussions will be a full two-level negotiation in which a stakeholder who has power relative to its government has a major effect on the government's ability to settle the case. These same considerations apply when the government is defending a measure that affects the interests of politically important stakeholders— such as an antidumping order that protects the steel industry or a regulation that discriminates in favor of domestic producers.

Policy cases, on the other hand, are brought for reasons of principle, with low stakeholder involvement or with overwhelmingly strong governmental direction. In this category fall the EC safeguards cases discussed above and the WTO and GATT disputes concerning the trade measures based on national security claims, such as the EU-U.S. dispute concerning the Helms-Burton Act,[59] complaints by Colombia and Honduras regarding Nicaraguan trade sanctions imposed in a border dispute,[60] or Nicaragua's GATT case against the U.S. trade embargo imposed in 1985.[61] If the stakes in a policy case are symbolic, if the objective is to obtain a panel report, or if the only acceptable outcome is removal of the offending measure (and this will not occur without a WTO decision), political disputes may be particularly difficult to settle. In the absence of a stakeholder with a financial interest in early settlement, the government may have no incentive to have a bargaining position oriented toward settlement.

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[58] For example, the GATT complaint by the United States in 1988 against Norway's quantitative restrictions on imports of apples and pears was brought in response to a request by Oregon and Washington fruit exporters supported by Senator Packwood, who was then chairman of the Trade Subcommittee of the Senate Committee on Finance. The panel report was useful in the Uruguay Round agricultural talks but was ultimately worth less than $500,000 in trade. Both the annex on GATT disputes, HUDEC, *supra* note 15, and the annex on Section 301 investigations, 1974–94, THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY (1994), show that individual trade disputes can have a remarkably small dollar value, particularly in relation to the effort expended.

[59] WTO, *United States—Cuban Liberty and Democratic Solidarity Act*, WT/DS38/1, May 13, 1996, (1996) (EC complaint against United States regarding Pub. L. No. 104-114).

[60] WTO, *Nicaragua—Measures Affecting Imports from Honduras and Colombia*, WT/DS188/1, Jan. 17, 2000 (complaint by Colombia); WT/DS188/2, Apr. 7, 2000 (panel request by Colombia); WT/DS201/1, June 6, 2000 (complaint by Honduras).

[61] GATT, Unadopted Panel Report, *United States—Trade Measures Affecting Nicaragua*, *supra* note 46.

B. *Before the Dispute*

Trade disputes do exist outside the WTO and before going to the WTO, and discussions on settlement very often take place in those contexts. Every government has a web of connections in which complaints can be raised: trade summits, official visits, bilateral or multilateral meetings at the WTO, or lower-key contacts. These arenas can be, and often are, used to negotiate a quick settlement, or to determine that settlement is not possible without the normative leverage of formal WTO proceedings. For this reason, the universe of WTO-focused disputes is substantially larger than the universe of disputes where WTO procedures have been invoked through a formal consultation request. Since every WTO-focused dispute that does not surface in a consultation request has been settled or withdrawn, statistics on settlement based solely on recorded WTO complaints greatly understate both the extent of settlement occurring under the shadow of WTO rules and the proportion of all disputes that are settled. A dispute generally does not reach the stage of a formal, visible request for WTO consultations unless it could not be settled bilaterally, or there was no realistic hope of settling it without formal proceedings.

C. *Notice*

A dispute starts to exist for WTO purposes when one Member requests consultations with another Member, under Article 4.2 of the DSU. The formal requirements for a request are provided in DSU Article 4.4: the request must be in writing, must give the reasons including identification of the measures at issue and the legal basis for the complaint, and must be notified to the WTO by the requesting Member. These requirements were an innovation of the DSU and ensure that all disputes will be visible to all Members.[62]

Identification of the problem in the consultation request is important both for legal and practical reasons. Under the terms of Article XXIII, "representations or proposals" must have been made before a complainant can request third-party adjudication by a panel (actual consultations are not

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[62] In the GATT era before 1989, the first required notice was a panel request; a disputant could request consultations orally or through bilateral correspondence not disclosed to the GATT and raise and settle a GATT dispute entirely outside the historical record. Thus, the underreporting of settlement that exists in the WTO was even more severe under the GATT. If the propensity to settlement is constant under both regimes, and the only change is introduction of reporting rules that bias reported disputes toward those that are less likely to settle, it can be expected that reported (as opposed to true) settlement rates under the WTO will decline compared to the GATT era.

required if the defending party refuses to consult).[63] The measure referred to a panel must have been the subject of at least a consultation request, although that measure may include later implementing rules.[64] The requirement for identification in a consultation request cannot apply to each claim, since consultations are legitimately a learning process and can lead to additional legal claims about a measure.[65] Practically speaking, it is useful to clearly identify the measures and issues in a consultation request because this document communicates the issues to stakeholders in the disputing parties and elsewhere, and to members of other WTO delegations who may later become panelists.

D. *Bilateral vs. Plurilateral Consultations*

DSU Article 4.4 also requires that a consultation request identify whether the consultations are requested under GATT Article XXIII (or its analogues in other covered WTO agreements), or GATT Article XXII (or its analogues). A request under either Article XXII or Article XXIII provides a sufficient legal basis for a later panel request.[66] If one Member requests

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[63] GATT, Panel Report, Uruguayan Recourse to Article XXIII, Nov. 16 1962, GATT B.I.S.D. (11th Supp.) at 95, 98 para. 5 (1962). The concept of a right to request a panel even when the defending party refuses to consult was first accepted in 1985, when Nicaragua requested a panel after the United States had refused to consult regarding the U.S. trade embargo against Nicaragua. GATT docs. L/5847 (Nicaraguan panel request), C/M/191, C/M/192 (Council minutes), *cited in* ANALYTICAL INDEX, *supra* note 33, at 672. This right is now codified in DSU Article 4.3, which permits a complaining party immediately to request a panel if the defending party does not respond to a consultation request or does not enter into consultations within thirty days.

[64] WTO, Appellate Body Report, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/AB/R, para. 132 (Aug. 20, 1999); WTO, Appellate Body Report, *Chile—Agricultural Products (Price Band)*, WT/DS207/AB/R, paras. 126–27, 135 (Sept. 23, 2002); WTO, Appellate Body Report, *United States—Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, paras. 70, 82 (Jan. 10, 2001).

[65] *See* WTO, Panel Report and Appellate Body Report, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/R, para. 7.9 (Apr. 14, 1999) (cited with approval at WT/DS46/AB/R, para. 132 (Aug. 2, 1999)):

> One purpose of consultations, as set forth in Article 4.3 of the SCM Agreement, is to clarify the facts of the situation, and it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel.

[66] Use of an Article XXII request as a basis for a panel request was accepted under the GATT as far back as the 1950s, reflecting the history of negotiation in the GATT's consultation and dispute settlement provisions. ANALYTICAL INDEX, *supra* note 33, at 674. The provisions on consultations in DSU Article 4 treat all consultation requests the

consultations with another Member under Article XXIII, no other Member has the right to participate in the consultations. Because of this feature, a government initiating dispute settlement with the intention of seeking a negotiated settlement or negotiated compliance, or otherwise seeking to be alone with the defending government, will normally use the Article XXIII track.[67] It is possible for a group of countries to request a single consultation under Article XXIII, as the complaining parties did in the WTO *Bananas* litigation.[68]

GATT Article XXII is entitled "consultation," not "dispute settlement."[69] Article XXII:1 requires "sympathetic consideration" and provision of opportunities to consult about representations by another party "with respect to any matter affecting the operation of this Agreement," even without any legal claim of violation.[70] Before the mid-1980s, Article XXII consultations were often used as a means to sit down and talk about a problem without any claims of legal violation.[71]

But the distinctive characteristic of Article XXII consultations in the WTO era has been the opportunity they provide for participation by other Members, transforming a bilateral consultation into a group discussion with the complaining party and a group of its allies. Article XXII:1 was first used for plurilateral discussions in the late 1950s as a solution to the problem of collectively dealing with the trade problems from formation of the EEC.[72] In

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same regardless of whether they are based on Article XXII or Article XXIII.

[67] *See, e.g.*, WTO, *United States—Measures Affecting Imports of Poultry Products*, WT/DS100/1, Aug. 25, 1997 (consultation request under Article XXIII by European Communities regarding U.S. Department of Agriculture Food Safety Inspection Service ban on imports of EC-origin poultry products; the case was settled after consultations, and imports resumed).

[68] *See* WTO, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/1, Feb. 13, 1996 (consultation request by five complaining parties under Article XXIII). The request was made under Article XXIII because Article XXII consultations would have been joined by the countries benefiting from EC banana preferences, with the consent of the EC. In a 1993 GATT dispute concerning U.S. mixing requirements for tobacco, ten countries held a joint Article XXIII consultation with the United States. GATT Doc. C/M/267 at 10 (1993), *cited in* GATT ANALYTICAL INDEX, *supra* note 33, at 671.

[69] GATT, *supra* note 26, at art. XXII.

[70] *Id.* at art. XXII.1.

[71] Marc Busch, *Democracy, Consultation, and the Paneling of Disputes under GATT*, 44 J. CONFLICT RESOL. 425, 439 (2000) (finding that under GATT, complaints under Article XXIII.1 were 40% more likely to escalate to a panel).

[72] The GATT Analytical Index provides a full explanation of the historical background. ANALYTICAL INDEX, *supra* note 33, at 612-13. When the GATT first discussed the Treaty of Rome in 1957, Part IV of the Treaty gave rise to intense

the late 1980s, the plurilateral aspect of Article XXII consultations was used so often that the Uruguay Round negotiators of the DSU generalized the GATT Article XXII:1 rules and applied them to other covered WTO agreements. Article 4.11 of the DSU provides that when a request for consultations under GATT Article XXII:1 (or an analogous provision in another covered agreement) is circulated, any other Member that has a substantial trade interest in the consultations may ask to participate in the consultations, within ten days after the date that the consultation request is circulated. If the defending Member agrees[73] that the claim of substantial trade interest is well founded, the requesting Member can participate in the consultations. If not,[74] the requesting Member is free to request consultations

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opposition by Commonwealth and Latin developing countries, which would lose European markets for their commodity products to the colonies and ex-colonies of the EEC-6. Discussions on Part IV could not be closed out and continued in the GATT Intersessional Committee. Eventually, as a means of moving forward, it was agreed to indefinitely put aside the question of the Treaty's consistency with GATT Article XXIV and focus instead on the concrete market problems. The vehicle used for consultations on these problems was Article XXII. *See* The European Economic Community, Nov. 29, 1957, GATT B.I.S.D. (6th Supp.) at 89–104 (working party report on the Rome Treaty) (discussion of Part IV); The Treaty Establishing the European Economic Community, Nov. 29, 1957, GATT B.I.S.D. (7th Supp.) at 69–71 (report on discussions in the Intersessional Committee). In this connection, procedures were agreed upon to provide the option of wider participation in a consultation under Article XXII. Any contracting party requesting a consultation under Article XXII was to inform the GATT for the information of all other contracting parties. Any other contracting party asserting a "substantial trade interest" could ask to participate in the consultations, and would "be joined in the consultation" if the defending contracting party or parties agreed that the claim of substantial interest was well founded. At the end of the consultation, the participants were to inform the GATT of the outcome. Procedures under Article XXII on Questions Affecting the Interests of a Number of Contracting Parties [hereinafter Procedures], Nov. 10, 1958, GATT B.I.S.D. (7th Supp.) at 24 (procedures adopted on Nov. 10, 1958). Compliance with this decision's notification requirements was spotty until the 1989 Improvements, *supra* note 52, and remained imperfect through 1994.

[73] This provision of Article 4.11 was based on the 1958 Procedures, *supra* note 72, where it responded to concerns of the EEC.

[74] For instance, when the EC, Japan, and the United States each requested consultations in 1996 under Article XXII with Indonesia about the Indonesian National Car Program, each requested participation in the others' consultations, as did Canada and Korea. *See* documents for *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54 (complaint by EC), WT/DS55 and WT/DS64 (complaints by Japan), and WT/DS59 (complaint by United States), July 2, 1998. Indonesia refused to permit the complaining parties to attend each others' consultations. WTO, Dispute Settlement Body—3 December 1996—Minutes of Meeting, WT/DSB/M/27, item 3 (Dec. 3, 1996). Eventually, the claims of all three were heard by a joint panel. *See* WTO, Panel Report, *Indonesia—Certain Measures Affecting the Automotive Industry*, WT/DS54/R (July 2,

on its own under Article XXII or XXIII (or their analogues) and if it does, will not be required to demonstrate substantial trade interest. An Article XXII-type consultation may end up as a large meeting with a substantial number of delegations in the room, particularly if the parties include the EC.

The procedural choice between Article XXIII and Article XXII as a vehicle provides an opportunity to signal a desire to talk settlement, or instead, to enhance the leverage of a single disputant by soliciting attendance by others who are supportive and to build coalitions. An Article XXII consultation provides a stage on which to pillory a Member with an unpopular measure; if it is already clear that no change will be made without a panel decision, the consultation process at least provides an opportunity to mobilize public opinion. In theory, disputes where the consultations are solely conducted under Article XXII should be less likely to settle. Busch and Reinhardt's empirical analyses of WTO dispute settlement do not reach this issue but they do find that involvement of multiple complainants, whether planned for or not, reduces the likelihood that the defending party will make concessions.[75]

E. *Consultations*

The DSU requires Members to enter into consultations promptly in good faith, with a view to achieving a mutually satisfactory solution.[76] Consultations customarily take place in Geneva, between the parties (and sometimes, interested third parties) with no WTO Secretariat or other referee present to mediate or create an official record. They can take days or involve a series of meetings over a long period if serious settlement talks are

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1998).

[75] Busch & Reinhardt, *supra* note 7, at 156. However, nothing prevents the complaining party from sitting down with the defending party informally and reaching a settlement that way.

[76] DSU, *supra* note 16, at art. 4.3. In the 1996 dispute on *Brazil—Measures Affecting Desiccated Coconut*, Brazil refused to consult under the WTO Agreement (since it argued that the dispute was subject only to the Tokyo Round Subsidies Code). The panel refused to rule on claims by the Philippines under DSU Articles 4.3 and 4.6, which were outside its terms of reference, but it noted in *obiter dicta* that:

> The Philippines's request concerns a matter which this Panel views with the utmost seriousness. Compliance with the fundamental obligation of WTO Members to enter into consultations where a request is made under the DSU is vital to the operation of the dispute settlement system . . . . In our view, these provisions make clear that Members' duty to consult is absolute, and is not susceptible to the prior imposition of any terms and conditions by a Member.

Brazil—Measures Affecting Desiccated Coconut, WT/DS22/R, at para. 287 (Oct. 17, 1996).

involved. But if both sides see the consultations as a box to be checked before requesting a panel, consultations may be over in less than an hour. The format and contents are entirely determined by the parties. DSU Article 4.6 provides that consultations are to be confidential and without prejudice to the rights of any Member in further proceedings. Accordingly, offers to settle a case cannot be used later to argue that the defending Member admitted a violation.[77]

F. *Discovery*

The complaining party may use the consultations to clarify the facts concerning the measure in question, and the defending party may try to persuade the complaining party that it has no factual case. Both sides may also try to probe for the legal theories that the other party will use. However, nothing other than self-interest compels either side to reveal any of its cards. Since consultations are unsupervised, a complaining party is on its own in gathering the facts for a case.

A complaining party must be ready with enough facts when and if it moves forward to a panel proceeding, and consultations are the only form of pre-panel discovery that exists. During the GATT era, disputes only rarely concerned facts other than the facts of a party's legal measure or facts in the record of an administrative proceeding. Panels generally avoided making any findings on the weight of parties' factual presentations, dodging such evaluations through the use of presumptions and other legal rules.[78] But there are a range of WTO obligations that depend on what the facts are regarding

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[77] The 1996 dispute on *United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R (Nov. 8, 1996), concerned a U.S. textile restriction which had been the subject of lengthy bilateral discussions. Costa Rica argued that after making a finding that imports at the level of 14.4 million dozen per year were causing serious damage to the U.S. domestic industry, the U.S. authorities engaged in bilateral negotiations with Costa Rica in which U.S. negotiators offered guaranteed access for 21.5 million dozen conditional on use of U.S. fabric. Costa Rica then argued that in light of these offers, the restriction was motivated by protection of U.S. textile makers, not the industry making the like product. *Id.* at para. 5.16. The panel found:

> In our view, the wording of Article 4.6 of the DSU makes it clear that offers made in the context of consultations are, in case a mutually agreed solution is not reached, of no legal consequence to the later stages of dispute settlement, as far as the rights of the parties to the dispute are concerned. Consequently, we will not base our findings on such information.

Id. at para. 7.27.

[78] *See, e.g.*, the GATT panel decision applying presumptions to the factual disputes regarding the application of GATT Article XI.2(c), *in* Japan—Restrictions on Imports of Certain Agricultural Products, GATT B.I.S.D. (35th Supp.) at 163 (1988).

issues such as the qualities of a product, or what steps a government took, and complaining parties no longer shrink from bringing cases under such provisions. Panels and the Appellate Body have evolved legal rules on the burden of proof of facts, and panels have found often enough that the complaining party did not meet its burden; moreover, since DSU 17.6 limits appeals to issues of law, a panel's determination regarding the facts cannot be appealed. A panel can ask a party to disclose facts to the other side,[79] but only the complaining party can argue its case. A panel cannot help a party that has not presented enough facts and arguments to meet its burden of proof.[80]

G. *Settlements*

As noted above, if a dispute can be settled bilaterally, it probably will not reach the level of a request for WTO dispute settlement; WTO consultation requests therefore select disputes that are inherently more difficult to settle by agreement. However, settlement by negotiation does happen sometimes during consultations, or later in a dispute. Settlement may consist of elimination of the measure, phased-in compliance under shelter of a waiver

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[79] *See, e.g., Australia—Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R, at paras. 6.1–6.14 (May 25, 1999) (requesting copies of loan and grant contracts between Australian government and Howe Leather Co., report by KPMG accountants used in determining compensation arrangements for Howe, correspondence between the Australian government and Howe regarding performance targets under the grant contract, and documents indicating the legal basis for the grant and loan under Australian law); *see also id.* para. 4.1 (regarding special procedures for treatment of business confidential information by panel and parties).

[80] WTO, Appellate Body Report, *Japan—Measures Affecting Agricultural Products*, WT/DS76/AB/R, at paras. 120–31 (Mar. 19, 1999). The panel had found that the Japanese varietal testing requirement violated Article 5.6 of the Agreement on Application of Sanitary and Phytosanitary Measures because alternative measures (determination of sorption levels) existed that provided some level of protection and were less trade-restrictive. *Id.* The Appellate Body reversed because the panel finding was based on testimony of experts advising the panel, and the complaining party (United States) had not claimed that determination of sorption levels was a measure meeting requirements of Article 5.6. According to the Appellate Body:

> [P]anels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses . . . to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party.

Id. at para. 129.

of obligations,[81] or other trades of benefits.[82] The DSU requires that settlements are notified to the WTO, but compliance with this requirement has not been universal; notifications do not always include details, and there is no means of checking that a notification has not omitted a relevant point.

A case may also be settled when the complaining party abandons some or all of its claims after it discovers that the claims lack sufficient factual basis, the measure no longer exists, or the legal arguments supporting the claim are not likely to prevail. A defending party may be able to persuade the complaining party that success in litigation will be more difficult than predicted, that success in litigation may be fruitless, or that a practical solution to the trade problem at issue is better achieved through a negotiated solution. Since there is usually more than one way to comply with a given WTO obligation, it may be entirely rational to abandon a claim if the complaining party believes that it cannot prevent the defending party from complying in a manner that is useless to the stakeholder. In another variation, a defending party may change its law to provide the same protection in a manner that it believes is more defensible.[83] Claim abandonment may also, of course, reflect pure arm-twisting and pressure politics.

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[81] *See* WTO, *Hungary—Export Subsidies in Respect of Agricultural Products*, WT/DS35/1 (Mar. 27, 1996). After discussions in the WTO Committee on Agriculture, consultations with six agricultural exporting Members, and establishment of a panel, the interested Members agreed with Hungary on a program to bring its export subsidies into conformity with its Uruguay Round commitments over time and a waiver to provide legal shelter until Dec. 31, 2001. *Id.*; *see also* WTO, Waiver Decision, *Hungary—Agreement on Agriculture*, WT/L/238 (Oct. 29, 1997).

[82] When India brought a complaint of discrimination by Poland against its automobile exports in 1995, WTO, *Poland—Import Regime for Automobiles*, WT/DS19/1 (Sept. 28, 1995), the settlement reached provided for the establishment by Poland of a reduced-rate tariff rate quota for automobiles with engines of up to 996 cc, originating in developing countries benefiting from Poland's GSP tariff preferences. WTO, *Poland—Import Regime for Automobiles—Notification of Mutually Agreed Solution*, WT/DS19/2 (Sept. 11, 1996). Poland's GSP scheme was limited to countries with a GDP per capita lower than Poland, and thus excluded Korea, the major exporter of automobiles in this size class.

[83] For instance, when challenged in the WTO regarding the legality of its minimum specific duties on imports of footwear in 1996–97, Argentina revoked the duties on footwear and on the same day initiated a safeguard investigation and imposed provisional safeguard measures on footwear in the form of minimum specific duties. WTO, Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, at para. 2 (Dec. 14, 1999). Similarly, after the EC requested a panel regarding Chile's taxes on distilled spirits, Chile revised the taxes; after the EC pursued a complaint against the revised tax system, the panel found that the new tax "fits in a logical connection with existing and previous systems of de jure discrimination against imports." WTO, Panel Report, *Chile—Taxes on Alcoholic Beverages*, WT/DS87/R at

DSU Article 5 does provide for good offices, conciliation, or mediation if the parties to a dispute agree—implicitly limiting these forms of settlement to situations in which a complainant has already committed itself to bringing a dispute. A July 2001 proposal from the WTO Director-General for procedures to operationalize Article 5 noted that Article 5 had never been used.[84] There has still been no mediation to date within a dispute. The only known mediation to date, regarding EC preferences for canned tuna, occurred instead of dispute settlement proceedings. The mediation successfully settled the differences between the parties, due to a number of factors: the use of unique leverage by the complainants to get the EC's attention to their problem,[85] skilled mediation by a veteran dealmaker who

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paras. 1.2–1.5, 2.1–2.7, & 7.159, WT/DS110/R (June 15, 1999). These are examples involving substitute measures that were still challenged and found to violate WTO obligations; in other cases a change in legislation eliminated the violation or otherwise convinced the complaining party to abandon its claims.

[84] WTO, *Article 5 of the Dispute Settlement Understanding—Communication from the Director-General*, WT/DSB/25 (Jul. 17, 2001). The proposal called for direct involvement of the Director-General or a Deputy Director-General; their role would be explicitly non-juridical.

> Legal conclusions regarding a particular dispute are best left to the formal dispute settlement process. Rather, Article 5 proceedings should be seen more as efforts to assist in reaching a mutually agreed solution. It should also be recalled that Article 25 provides for Arbitration and the Director-General does not wish to encroach upon this provision of the DSU.

Id. at 3. Requests under Article 5 could only be made after commencement of a formal dispute and would have to specify which form of settlement was requested. *Id.* at 5. The proposal characterized "good offices" as overseeing of logistical and Secretariat support, "conciliation" involving direct participation by the Director-General (or Deputy) in negotiations, and "mediation," including the possibility of actually proposing solutions, if appropriate. *Id.* at n. 9.

[85] In 2001, the EC requested a WTO waiver for the tariff preferences in its proposed Partnership Agreement with the African, Caribbean, and Pacific (ACP) states. The ACP states threatened to block the launch of a new round of trade negotiations unless this waiver was approved. During the examination of the waiver request, Thailand objected to the impact of the preferences on Thai canned tuna exports to the EC, which would face a 32% MFN tariff while ACP tuna would be duty-free. WTO, *Questions from Thailand Regarding the Request for a WTO Waiver Concerning the New ACP-EC Partnership Agreement*, G/C/W/323 (Oct. 19, 2001). Under the consensus decisionmaking procedures applicable to waivers, Thailand could threaten to block the preferences unless its concerns were satisfied. Although Article IX:3 of the Marrakesh Agreement Establishing the WTO provides for approval of waivers by vote, in 1995, the WTO General Council adopted an agreed statement providing for decisions on waivers by consensus. WTO, *Decision-Making Procedures Under Articles IX and XII of the WTO Agreement, Statement by the Chairman as agreed by the General Council on 15 November 1993*, WT/L/93 (Nov. 24, 1995). During the Doha Ministerial Meeting, the EC finally cleared

suggested a practical solution,[86] goodwill on the part of the EC in promptly implementing the solution increasing the complainants' market access,[87] and the fact that the problem was framed not in terms of legal rights but as a question of impairment of interests.[88]

H. *Panel Proceedings*

After the consultation/waiting period is over, the complaining party may request a panel. But this does not close the door on settlement negotiations. A panel request may simply signal greater seriousness and set a deadline for

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the way for approval of the waiver and the launch of the Doha Round by providing a letter from EC Commissioner Pascal Lamy agreeing to consultations with Thailand on this issue and mediation if the consultations did not settle the matter. WTO, *Communication from Thailand With Respect to the Waiver Application for the New ACP-EC Partnership Agreement*, G/C/W/344 (Nov. 27, 2001) (including text of letter from Pascal Lamy agreeing to consultations to be completed by April 20, 2002 and mediation as provided under DSU Article 5). After three rounds of consultations, the Philippines, Thailand, and the EC requested mediation on September 4, 2002 concerning the extent to which the legitimate interests of the Philippines and Thailand were being impaired by preferenctial tuna tariffs and the means by which this situation could be addressed. WTO, *Request for Mediation by Philippines, Thailand and the European Communities*, WT/GC/66 (Oct. 16, 2002) (concerning request for mediation, terms of reference for mediation, appointment of Deputy Director-General Rufus Yerxa, and procedures to be used). The parties chose to use procedures similar to the 2001 Article 5 procedures, *supra* note 77.

[86] The mediation was carried out by WTO Deputy Director-General Rufus Yerxa, who proposed a solution to the parties on December 20. WTO, *Request for Mediation by Philippines, Thailand and the European Communities—Addendum*, WT/GC/66/Add.1 (Dec. 23, 2002).

[87] On June 5, 2003, the EC adopted a regulation implementing the proposed solution: a tariff-rate quota for non-preferential imports of tuna at an in-quota duty rate of 12%. Ninety-nine percent of the amount was allocated to Thailand, the Philippines, and Indonesia on the basis of past imports. Council Regulation (EC) No. 975/2003 of 5 June 2003 opening and providing for the administration of quota for imports of canned tuna covered by CN codes 1604 14 11, 1604 14 18, and 1604 20 70, 2003 O.J. (L 141/1).

[88] The Lamy letter in G/C/W/344, *supra* note 78, agreed to consultations to "examine the extent to which the legitimate interests of Thailand are being unduly impaired as a result of the implementation of the preferential tariff treatment for canned tuna originating in ACP states and consider means by which the legitimate interests of Thailand may be addressed." The later request for mediation had the same terms of reference. WT/GC/66, *supra* note 78. The waiver for the ACP/EC Partnership made it impossible to claim that the EC's preferential tariff treatment of ACP tuna violated the GATT's most-favored nation clause.

settlement.[89] For instance, in 1996, a U.S. complaint against the EC's implementation of its Uruguay Round tariff concessions on rice and other grains was settled just before the DSB meeting that was to establish the panel; EC delays in implementing the deal resulted in two additional U.S. panel requests, each withdrawn.[90]

Even establishment of a panel does not prevent settlement negotiations, for panel establishment begins the process of selecting panelists through discussion between the parties and the Secretariat. Panel selection can take months even if the parties are willing, and it is the chief source of avoidable delay in WTO dispute settlement. Since any party can cut off the selection process after twenty days have gone by, these delays implicitly reflect tacit consent by the parties to delay.[91] Parties may also request the Secretariat to suspend the panelist selection process,[92] and may provide in a settlement that if implementation fails the selection process will resume.[93] As of July 30, 2003, in eight of eighteen cases listed by the WTO Secretariat as "active panels" where panels had been established, the panel had not yet been composed, after delays ranging from one month to four years.[94]

Settlement also occasionally occurs during a panel proceeding but as a result of party initiative, not as a result of conciliation or mediation by the panel. As noted above, WTO mediation has only taken place instead of, not during, dispute settlement proceedings. DSU Article 12.12 permits a panel to suspend its work at the request of the complaining party (a signal that settlement talks are ongoing). Of the twelve cases where such suspensions

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[89] The U.S. complaint against Pakistan's failure to provide a "mailbox" for patent applications under Article 70.8 of the TRIPS Agreement was settled after a panel request and before panel establishment. WTO, Notification of a Mutually-Agreed Solution, *Pakistan—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS36/4 (Mar. 7, 1997). Immediately after panel establishment pursuant to WTO, Panel Request by India, *United States—Measures Affecting Imports of Women's and Girls' Wool Coats—Communication from India*, WT/DS32/2 (Apr. 30, 1996), the United States withdrew the textile restraint at issue. *Update*, *supra* note 2, at 159.

[90] *Update*, *supra* note 2, at 169 (regarding WTO, *European Communities—Duties on Imports of Grains*, WT/DS13).

[91] DSU Article 8.7 provides that if there is no agreement as to the panelists within twenty days after the date the panel is established, any party can ask the WTO Director-General to complete the panel within ten days.

[92] *See* WTO, *Chile—Measures Affecting the Transit and Importation of Swordfish*, WT/DS/193/3 (Apr. 6, 2001) (cited in *Update*, *supra* note 2, at 173).

[93] *See* WTO, *Argentina-Transitional Safeguard Measures on Certain Imports of Woven Fabrics of Cotton and Cotton Mixtures Originating in Brazil*, WT/DS190/2 (June 30, 2000) (cited in *Update*, *supra* note 2, at 165).

[94] *Update*, *supra* note 2, at 38–50.

have been notified, five have ripened into settlements;[95] in three, the parties have let the panel lapse after a year of suspension,[96] and in four, suspension talks were unsuccessful.[97] In theory, WTO panels may actively encourage settlement, but in practice none do. Article 11 of the DSU provides that panels "should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution,"[98] and some GATT panel reports in the 1972–1984 period recorded activity by the panel encouraging settlement negotiations.[99] But there is no trace in any

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[95] WTO, Panel Report, *EC—Trade Description of Scallops*, WT/DS7/R, WT/DS12/R, WT/DS14/R (Aug. 5, 1996) (settlement just after interim panel report); WTO, *Belgium—Administration of Measures Establishing Customs Duties for Rice*, WT/DS210/5 (Nov. 21, 2001); WTO, *United States—Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of one Megabit or Above from Korea*, WT/DS99/11 (Sept. 25, 2000) (settlement during DSU Art. 21.5 panel); WTO, *Australia—Measures Affecting the Importation of Salmonids*, WT/DS21/9 (May 16, 2000) (settlement by the United States after suspending a U.S. case until just after outcome of Canada Art. 21.5 panel against Australia on same issue); WTO, Panel Report, *European Communities—Measures Affecting Butter Products*, WT/DS72/R (Nov. 24, 1999) (settlement just after interim panel report).

[96] *See* WTO, *United States—The Cuban Liberty and Democratic Solidarity Act*, WT/DS/38/6 (Apr. 24, 1998). This dispute on the "Helms-Burton Act" was resolved by bilateral agreement just before the deadline for panel submissions, and against the background of statements by the United States that it would refuse to participate in WTO panel proceedings; *see also* WTO, *United States—Measure Affecting Government Procurement*, WT/DS88/6, WT/95/6 (Feb. 14, 2000); WTO, *Argentina—Measures Affecting Textiles and Clothing*, WT/DS77/6 (May 24, 2002).

[97] WTO, Panel Report, *EC—Trade Description of Sardines*,WT/DS231/R (June 10, 2002) (attempt to settle after interim panel report); WTO, *EC—Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/4 (Jan. 18, 2002) (settlement talks well before interim panel report); WTO, *EC—Customs Classification of Certain Computer Equipment*, WT/DS62/7 (Nov. 28, 1997) (attempt to settle after interim panel report); WTO, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/8 (Mar. 27, 1998) (attempt to settle just before issuance of interim panel report).

[98] This provision was incorporated from the 1979 Framework Agreement on dispute settlement, *supra* note 43, at para. 16.

[99] See the *Dollar Banana* case, *supra* note 41, and other reports recording unsuccessful attempts by the panel to urge settlement. Canada—Withdrawal of Tariff Concessions, GATT B.I.S.D. (25th Supp.) at 42, para. 5 (May 17, 1978); Norway—Restrictions on Imports of Certain Textile Products, GATT B.I.S.D. (27th Supp.) at 119, para. 4 (Jun. 18, 1980); Panel on Quantitative Restrictions against Imports of Certain Products from Hong Kong, GATT B.I.S.D. (30th Supp.) at 129, para. 4 (Jul. 12, 1983); Japanese Measures on Imports of Leather, GATT B.I.S.D. (31st Supp.) at 94, para. 5 (May 15-16, 1984). Three GATT panel reports from 1978–81 record settlements reached concerning Japanese import measures against a background of encouragement by the

WTO panel report of any conciliation or mediation activity by a WTO panel during a panel proceeding.

Few cases settle during the active phase of a panel proceeding, mainly for political or bureaucratic reasons and sunk costs. By the time a panel has started its work, a defending party will have committed itself to defend the measure at issue, making a policy reversal before the panel's verdict costly or impossible. At trial in U.S. courts, there may be a large flow back and forth of information so that the litigators on each side can have an increasingly accurate estimate of their likelihood of prevailing and of the downside risk of loss. But WTO litigation is episodic, with comparatively little information flow; little of nothing changes *during* litigation to induce settlement.

Settlement motivated one feature of GATT dispute settlement, which was inherited by the WTO: the practice of issuing the panel's final report to the parties in advance of the public, so that the parties might have one last chance to settle. Although some settlements occurred at that point during the GATT era,[100] the DSU regime provides for earlier interim panel reports. Since in practice the bottom-line findings in an interim report do not change, a well-organized litigant will use the interim panel report to consult with stakeholders, evaluate the chances of an appeal, and either start writing its appellate arguments or initiate settlement talks. In four cases on EC measures, the interim panel report triggered serious settlement talks with the EC. In the two cases where a deal was reached, the exporter agreed to bury the legal findings in the panel reports and got immediate market access in exchange.[101]

No WTO case has yet been settled after a panel report is circulated and before the report is adopted by the DSB together with the Appellate Body report (if any). A case may be effectively settled or abandoned by a failure to appeal an unfavorable ruling, but in many cases, the larger impacts flowing from a panel ruling will impel a government to appeal. Conciliation and settlement has never occurred in the middle of an appeal conducted on the WTO's compressed time frame.[102] Failure to appeal a panel report may

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panel. Japan Measures on Imports of Thrown Silk Yarn, GATT B.I.S.D. (25th Supp.) at 107, para. 5 (May 17, 1978); Japan's Measures on Imports of Leather, GATT B.I.S.D. (27th Supp.) at 118, para. 4 (Nov. 10, 1980); Japanese Restraints on Imports of Manufactured Tobacco from the United States, GATT B.I.S.D. (28th Supp.) at 100, para. 10 (Jun. 11, 1981).

[100] *See, e.g.*, Japan cases on thrown silk yarn and tobacco, *supra* note 99.

[101] WTO, Panel Report, *EC—Trade Description of Scallops*, WT/DS7/R, WT/DS12/R, WT/DS14/R (Aug. 5, 1996) (complaints of Canada, Peru, and Chile settled in 1996); WTO, EC—*Measures Affecting Butter Products*, WT/DS72/1 (Apr. 3, 1997) (complaint by New Zealand settled in 1999).

[102] There is one recorded case of a true abandonment of an appeal, by India in the

signify settlement,[103] or a loss on factual grounds,[104] or may simply signify a tactical decision to use the panel report as the basis for negotiations on implementation.[105]

After the DSB has adopted the reports of the panel and the Appellate Body, the implementation process begins, starting with setting a deadline for compliance—a process that involves discussion of both what is required to comply, and how long it will take. When the disputing parties cannot agree on a compliance deadline and must ask an arbitrator to set it for them, the likely cause is disagreement regarding what the losing party must do to comply.[106] A persistent litigant may continue to pursue compliance through negotiations throughout the period before the WTO compliance deadline, to the extent that the complying party is willing to talk.

After the compliance deadline passes, a complaining party that wishes to seek a further WTO determination regarding the legality of measures taken to

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dispute on *India—Measures Affecting the Automotive Sector*, but India's withdrawal of its appeal does not appear to have been associated with concessions by either side. India complied with the panel recommendations and rulings but not until four months later. *See* WTO, *India—Measures Affecting the Automotive Sector*, WT/DS146/9, WT/DS175/9 (Mar. 14, 2002) (notice issued by Appellate Body regarding India's withdrawal); WT/DS146/14, WT/DS175/14 (Nov. 13, 2002) (notification by India regarding compliance). The United States withdrew its appeal in the *U.S.—FSC* case and refiled it. See WTO, *United States—Tax Treatment for "Foreign Sales Corporations"—Withdrawal of Appeal*, WTDS108/6 (Nov. 3, 1999) (withdrawl of notice of appeal); WT/DS108/7 (Nov. 26, 1999) (notice of appeal refiled). The withdrawal and refiling were done for scheduling reasons and were agreed in advance with the EC.

[103] *See e.g.*, WTO, Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/R (July 2, 1998) (decision by Indonesia not to appeal the panel report on the Suharto-period National Car Program). Indonesia had agreed with the IMF to comply with the panel report.

[104] *E.g.*, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (Apr. 22, 1998).

[105] *See, e.g.*, WTO, Panel Report, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R (Jan. 28, 2000); WTO, Panel Report, *United States—Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R (Dec. 22, 2000); WTO, Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999).

[106] *See, e.g.*, WTO, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan—Arbitration under Article 21.3(c) of the Understanding on Rules Legislating the Settlement of Disputes*, WT/DS184/13 (Feb. 19, 2002). The fundamental disagreement between Japan and the United States concerned the contents of required implementing legislation, whether corrective administrative action could be taken during the legislative amendment process or would have to be taken afterward, and how long legislation would take.

comply may request a review by the original panel, under DSU Article 21.5. The complaining party may also request the DSB to authorize suspension of concessions (permitting assessment of retaliatory duties or quotas) against the trade of the Member that has allegedly failed to comply, in an amount equivalent to the nullification or impairment (the damage caused to the complaining party's trade by the other party's failure to comply with WTO obligations). The complying Member can ask for the original panel to arbitrate regarding the proposed level of suspension of concessions. Settlement of cases can happen during this post-compliance litigation.[107] Even after the DSB formally authorizes suspension of concessions, the complaining party need not actually impose trade retaliation; after the DSB authorized Canada to suspend concessions against Brazil, in a dispute regarding export financing for aircraft, Canada did not do so and instead pursued compliance.

After the complaining party suspends concessions and implements the authorized retaliatory measures, it is still possible to reach a settlement and such a settlement would presumably involve revocation of the measures. A group of WTO Members has backed a proposal for DSU reform, one of the elements of which is an expedited procedure to review post-retaliation compliance measures and mandate their reduction or removal.[108] However, so far the only way that retaliatory measures have been revoked has been through a settlement agreement.[109]

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[107] The dispute on *United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea* was settled during an Article 21.5 compliance proceeding. *See* WTO, *United States—Anti-Dumping Measures on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/12 (Oct. 25, 2000) (joint notification of settlement by Korea and the United States). Upon request by the parties, the compliance panel suspended its work and the parties settled the case based on a revocation of the antidumping order in question as a result of a five-year "sunset" review by the U.S. Department of Commerce. The notification of settlement was submitted after the Commerce Department announced revocation. *See* Anti-Dumping Measures on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, Final Results of Fall Sunset Review and Revocation of Order, 65 Fed. Reg. 59,391 (Oct. 5, 2000).

[108] WTO, Dispute Settlement Body, *Negotiations on Clarifications and Improvements of the Dispute Settlement Understanding—Proposal by Japan*, TN/DS/W/22 (Oct. 28, 2002) (resubmitting group proposal, WT/MIN(01/W/6)).

[109] After many attempts, the *Bananas* dispute was finally settled through negotiations in April 2001. *See* WTO, Notification of Mutually Agreed Solution, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/58 (July, 2, 2001). The GATT waiver required in order to implement the settlement consistent with the WTO Agreement was eventually approved at the Doha Ministerial Meeting. WTO, Ministerial Conference, *European Communities—*

V. Litigation and Negotiation Models and WTO Dispute Settlement

With this discussion as background, we turn to economic models of dispute settlement. Civil litigation models fall into two basic types: those based on optimism (the parties' subjective opinions about the likely outcome) and those based on asymmetry of information. The decision whether to settle a claim is modeled as a strategic bargaining game affected by the expected outcome at trial, and the expected value of settlement or trial in turn determines whether a harmed party brings a claim. The analysis works backwards from the expected outcome, assuming strategic behavior by the players. Litigation bargaining is modeled as a cooperative game whose cooperative solution is settlement and whose noncooperative solution is trial.[110] The players are assumed to be rational, unitary decisionmakers who make their decisions on the basis of expected costs and benefits from the possible outcome and the expected costs of the litigation necessary to get there.

In an optimism model, the sum of the plaintiff's threat value (expected gain from going to trial minus trial costs), and the defendant's threat value (expected loss from trial plus trial costs) equals the noncooperative value of the game, or the plaintiff's expected gain less the defendant's net loss minus the trial costs of both parties. The surplus generated from cooperation (settlement) equals the difference between the costs of trial and the costs of settlement, plus the difference in subjective expectations about damages to be awarded at trial. If this surplus is positive there is scope for settlement. There is more scope for settlement when trial costs are higher, when transaction costs of settlement are lower, when the plaintiff believes it will win less than the defendant believes it will lose (the parties are pessimistic), or when the parties are risk-averse. When the plaintiff's minimum expected win, less costs, exceeds the defendant's maximum expected loss, the settlement range disappears. Assuming strategic behavior, an increase in the damages that can be awarded will increase the payoff to the plaintiff from trial, increasing the parties' optimism and making trial more likely. On the other hand, an increase in damages will also tend to increase the amount parties will spend on trying to win at trial, increasing the surplus from cooperation, making trial less attractive to risk-averse defendants, and making settlement more likely.[111]

Transitional Regime for the EC Autonomous Tariff Rate Quotas, WT/MIN(01)/16 (Nov. 14, 2001).

[110] Cooter & Rubinfeld, *supra* note 6, at 1069.

[111] *Id.* at 1075–77.

Models that focus on asymmetries of information assume that if both parties know whether the plaintiff will win, they will reach a settlement dividing the surplus generated by not going to trial. Failure to settle occurs because one side has less knowledge than the other about the facts and law determining liability and damages, and therefore is unable to make an offer that the other side should accept. If the defendant has better knowledge of the factual issues or legal analysis that determine whether the plaintiff will win at trial, and the plaintiff only knows what the average success rate of lawsuits is, then the defendant will be equipped to accept settlement offers when it knows it will lose, and reject them if it expects to win. Since the cases where the defendant would lose at trial are all settled, defendants then win in most trials. Corresponding results apply if the plaintiff has better information, as at trial mainly the better-informed side wins.[112]

Andrew Guzman has pointed out the apparent contradiction between the results predicted by the asymmetric information model and the rulings observed in the GATT and at the WTO. In the overwhelming majority of GATT cases, the panel ruled for the complaining party on some or all claims. The same is true to a slightly lesser extent in the WTO; Guzman still calculates a 90% win rate for complaining parties, based on panel and Appellate Body rulings.[113] Guzman argues that complaining parties could not possibly be better-informed than defending parties and rejects the asymmetric information model as an explanation for the complainant win rate.[114] The batting average of complaining parties in the WTO does raise the question: if a defending party has superior information on whether it will lose, or is even aware of the *average* success rate of defending parties in the WTO, why does it continue to pursue a losing case instead of doing the rational thing by negotiating a settlement, and why does this happen in case, after case, after case? Is this seemingly irrational behavior fully explained by the lack of retroactive damages in GATT/WTO litigation and consequent lack of any penalty for delay, or is there something more going on?[115]

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[112] Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404 (1984); ANDREW T. GUZMAN, THE POLITICAL ECONOMY OF LITIGATION AND SETTLEMENT AT THE WTO 4 (UC Berkeley Public Law & Legal Theory, Res. Paper No. 98, 2002), *at* http://ssrn.com/abstract_id=335924.

[113] Guzman, *supra* note 107, at 4. "Win" is defined in the paper as a finding of violation of at least one WTO obligation.

[114] For instance, most complainant cases are brought by a few countries, and the same litigants (and their lawyers) are alternately complainants and defending parties. *Id.* at 5–6.

[115] *See generally* Steven Shavell, *Suit Versus Settlement When Parties Seek Nonmonetary Judgments*, 22 J. LEG. STUD. 1 (1993) (modeling breakdown in negotiations when bargaining involves an indivisible item and nonmonetary relief;

In Guzman's model, these lopsided statistics are a function of asymmetric political payoffs, assuming that a panel win means the defending party eliminates the measure.[116] Assuming that information on probability of success is common knowledge, the settlement amount must be at least as much as the complainant's expected net return from winning, and not more than the defending party's expected cost if the case goes to the panel. An increase in the probability of a complainant victory at panel will shrink the settlement range if and only if the cost to a defending party of losing at the panel stage, plus the impact of delay, are larger than the complaining party's payoff from panel victory minus the impact of delay. In this model, cases settle because the defendant's incentive to pay to make them go away, even though the defendant benefits from delay, is stronger than the complaining party's incentive to win before the panel (net of delay costs). The fact that the complainant mainly wins means that for most WTO complaints, the defending party's cost of going through the panel process is smaller than the benefits of a win to the complaining party.[117]

Cases also fail to settle, according to Guzman, because the benefits of delay to the defending party and the ability to claim that its hands are tied, exceed the defendant's perceived cost from a negative panel ruling (including the expected cost of compliance, the expected cost of sanctions in the event of noncompliance, and the expected cost of future claims that might be based on the ruling as a precedent).[118]

If a defending party cannot agree to a result that will satisfy the complaining party unless it has already lost a panel proceeding, the ability for the government to claim its hands are tied by the WTO becomes a benefit only obtainable through a panel ruling, to be netted out against the costs to it of a panel proceeding: settlement is only possible *after* a panel ruling. As Guzman notes, a complaining party also might be pressured by a stakeholder and unable to give up on a low-probability WTO claim unless officially rejected by a panel.[119]

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application of models of such situations to bargaining situations typical in the WTO could prove fruitful).

[116] This is a strong assumption in view of observed non-compliance rates. In the GATT, only 40% of complaining party wins were followed by full concessions. Marc Busch & Eric Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement, in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE: ESSAYS IN HONOR OF ROBERT HUDEC 471 (Daniel M. Kennedy & James D. Southwick eds., 2002).

[117] Guzman, *supra* note 112, at 11–12.

[118] *Id.* at 14.

[119] *Id.* at 15.

Alternative explanations exist for the high complainant win rate. Specifically, complaining parties almost always settle or abandon cases that are not going to win, or they do not bring them to begin with. But this in turn is more easily explained by abandoning the assumption that both parties have common knowledge of the probability of success, and observing that the extent of information asymmetry may change over time. Until the panel rules, the complaining party may be better informed than the defending party about the ultimate strength of its complaint and its ability to assemble the factual and legal arguments necessary to meet its burden of proof. Common sense tells us that no matter what the litigation forum, a party who sues and fails to win is always substantially worse off than if it had never sued at all. Before losing in court, even a nuisance plaintiff has some possibility of obtaining a settlement if a risk-averse defendant does not know how good the case really is, and would rather not go to court to find out.[120] After losing in court or in the WTO, the complaining government or its stakeholder has removed any mystery about the value of its legal claims, and in the process has confirmed that the defending party only did what it had every right to do.[121]

We then have three types of explanations for why WTO Members, particularly defending parties, appear not to be settling cases in a rational manner: because both sides are too optimistic; because asymmetries of information are most possible at the time of settlement; and because the defending party has insufficient incentives to pay to make the case go away.

VI. PROMOTING SETTLEMENT?

Early settlement of WTO disputes by negotiation and agreement has real social and economic benefits. If the parties cannot reach a settlement without going through panel and Appellate Body proceedings, or even further steps up through retaliation, the costs of their inability to settle include not just the parties' legal costs and the political costs of moving a case forward, but also the wear and tear on the WTO and bystander governments and private parties from retaliation, distraction from other initiatives, and loss of potential gains from cooperation. Even settlement during the later phases of a dispute may be Pareto-superior to a litigated outcome with perfect compliance, since typically there are a range of outcomes possible under compliance, and some

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[120] Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437, 440 (1988).

[121] For instance, the outcome for the Canadian asbestos industry after the WTO *Asbestos* litigation was not neutral compared to the situation if the WTO case had not been brought.

will not help the stakeholder. From a defending government's viewpoint, settlement may let the government address a stakeholder's market access problem while avoiding findings that would call for costly legislative changes.

Settlement is particularly important for the mainstream cases, with stakes that range from purely symbolic to commercially moderate ($150 million). How can the WTO facilitate bargaining that will address the concerns of both sides in these disputes?

The optimism model suggests that the settlement ranges of parties will be increased if the marginal cost of panel proceedings is higher, if the transaction costs of negotiation and settlement are lowered, and if disputants become more pessimistic about going through with panel proceedings or more risk-averse. Conversely, settlement would become less likely where the marginal cost of panel proceedings is low, negotiating a deal is difficult, or disputants are more optimistic. Thus, relevant factors include the marginal cost of panel proceedings, the transaction costs of negotiation and settlement, and party optimism.

WTO panel proceedings are more technical than panel proceedings under the GATT, include more issues and include an appeal: they obviously cost more. Some parties outsource litigation functions by the hour; others rely on salaried staff. Almost all require business stakeholders seeking governmental espousal of a complaint to provide (or pay for) legal assistance. The same governments may rely on salaried government counsel to defend government policies and actions—lowering their perceived marginal costs of litigation and consequently these defendants' propensity to settle. Costs of litigation also include the political cost (and corresponding political benefit) of pursuing a WTO case, which may exceed the importance of the dollar amount at stake.

The transaction costs of settlement in a WTO proceeding start with the obstacles to communication and establishment of the trust necessary to reach agreement. Transaction costs could be expected to be lower for negotiating dyads who work together and against each other on many issues: unsurprisingly, Busch and Reinhardt find that the EC and United States tend to settle cases before panel proceedings, with the defending party offering concessions in advance of a panel ruling 58% of the time in the 1960–2001 period, and in 66% of all bilateral WTO disputes.[122] Frequent interaction between litigants' representatives promotes trust and reputation, fostering more efficient settlement.[123] Transaction costs impeding settlement also

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[122] Busch & Reinhardt, *supra* note 25, at 7.

[123] *See* Joel Waldfogel & Jason Scott Johnston, *Does Repeat Play Elicit Cooperation?: Evidence from Civil Litigation*, 31 J. LEGAL STUD. 39, 40–41 (2002)

include uncertainty about the stability of any deal. At present, the parties to a settlement agreement cannot use the WTO Agreement to enforce the terms of the deal as such,[124] and must trust each other or rely on the leverage of re-starting dispute settlement if the deal falls through. If the terms of the deal commit the defending party to take one of multiple compliance paths and the wrong compliance path is taken, the complaining party has no remedy.

Transaction costs may also relate to the nature of the matter in dispute. Securing a statutory change is more costly for a defending party than revising a regulation; a domestic regulatory statute may be structured so as to make it difficult or impossible for an administering agency to change the outcome for reasons (such as WTO obligations) that are extraneous to the statute itself. The subject of the dispute may also be inherently "lumpy," making it difficult to find a compromise.[125]

What measures would reduce the transaction costs of settlement? Privacy for the negotiating process can be essential for developing trust; this was the underlying rationale for traditional GATT document restrictions and for similar rules in WTO dispute settlement.[126] The rule excluding use of

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(examining a database of 2000 federal civil cases filed in the Eastern District of Pennsylvania in 1994 and finding that cases involving attorney pairs who interact repeatedly are resolved more quickly and are more likely to settle).

[124] Under DSU Article 1.1, DSU rules and procedures apply only to disputes brought under the agreements listed in Appendix 1 of the DSU; these agreements include only treaty texts in the WTO package, not bilateral settlement agreements.

[125] Andrew T. Guzman & Beth A. Simmons, *To Settle or Empanel?: An Empirical Analysis of Litigation and Settlement at the World Trade Organization*, 31 J. LEGAL STUD. 205, 222–23 (2002) (finding that transaction costs are very likely to explain escalation of disputes to the panel stage, and that "lumpy" issues—standards, tariff classification, product bans, absence of required laws—are more likely to escalate than "continuous" issues—tariffs, quotas, subsidies—for democratic countries). But experience provides examples of such "lumpy" issues that were not inherently indivisible, but susceptible to compromise. Compromises expressed in federal regulations appear every day of the week in the *Federal Register*. The first WTO dispute to go to a panel, on *United States—Conventional and Reformulated Gasoline* (WT/DS2), was almost settled through a compromise reflected in a proposed rule issued by EPA on April 21, 1994, altering only the rule's provisions on reformulated gasoline. *See* Regulation of Fuels and Fuel Additives: Individual Foreign Refinery Baseline Requirements for Reformulated Gasoline, 59 Fed. Reg. 22,800 (May 3, 1994). Implementation of this compromise was only blocked by a targeted provision in Senate appropriations legislation. *See Venezuela Vows GATT Challenge Following House Vote On Gas Rules*, INSIDE U.S. TRADE, Sept. 16, 1994. The disputes on *Scallops*, *supra* note 90 and *Butter*, *supra* note 90 were both settled.

[126] The information restrictions in question are better described as protecting process values and privacy, since in almost all cases the documents contained no secrets.

settlement offers in litigation[127] fits under this category as well. Enhancing communication and trust argues for a policy decision by individual litigant governments to involve negotiators on the dispute settlement team throughout a case, to avoid losing focus on settlement. The Advisory Centre for WTO Law, founded in 1999 as an intergovernmental organization, provides low-cost legal assistance on WTO law (including dispute settlement) to developing countries. If settlement is perceived as valuable, then legal aid to developing countries might be expanded to include expert assistance from trade negotiation professionals. Settlement agreements could also be made clearly enforceable, as Andrew Shoyer and Joost Pauwelyn have suggested.[128] Where "lumpiness" exists, it could be overcome by facilitating cash settlements, including side-payments to injured stakeholders.

It might be argued that the WTO could itself actively encourage settlement, by mandating more (or more genuine) conciliation effort by litigants, or perhaps by encouraging panel chairmen to lean on the parties, like a judge in a settlement conference for a tort case. But there may be little appetite for this among the litigant governments, who as DSB members have the last word on whether to accept any proposed change to the DSU. Mediation, conciliation, and the ability to call on the good offices of the Director-General on a voluntary basis during a dispute already exist under the present DSU rules, and Members are not using them. To argue that it is good to settle disputes is not to argue that it is bad to bring disputes or assert claims, but no litigant would publicly prefer a return to the GATT of the 1970s, when rule violation by the strong was widespread, and smaller players were expected to hold back tastefully on asserting their GATT rights.[129]

Proposals in the DSU negotiations and discussions in academic literature have argued for increasing the payoff to the complaining party through a change in the remedy provided by WTO panels. Provision of retroactive damages is widely supported in the academic literature as a means of discouraging hit-and-run behavior (like a three-month import ban during the peak market for a seasonal product), encouraging early compliance, and deterring governments from malicious delay. But aside from the other policy arguments for retroactive damages, it is not clear whether they would necessarily increase settlement. The availability of retroactive damages would make escalating to the panel process more costly, increasing the benefits of earlier settlement, particularly for a party that is risk-averse.

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[127] *See supra* note 77 and accompanying text.

[128] Andrew W. Shoyer, *The First Three Years of WTO Dispute Settlement: Observations and Suggestions*, 1 J. INT'L ECON. LAW 277, 287 (1998); Joost Pauwelyn, *The Americanization of Dispute Settlement*, 19 OHIO ST. J. ON DISP. RESOL. 121 (2003).

[129] *See supra* text accompanying note 99.

However, because a damage award would only be available if there were no settlement before a panel ruling, the possibility of damages would also increase the complaining party's expected gain from the panel process, decrease the complaining party's willingness to settle before a panel ruling, and decrease pre-panel settlement.[130]

A change in the DSU rules to provide for damages would also have distributional implications for the terms of settlement. If damages can only be awarded to the complaining party, the complaining party will raise its price for forgoing a panel ruling, and on average, settlement terms will tip toward complainants. This distributional effect may be what developing country negotiators had in mind in proposing damage awards in the GATT and WTO.[131] However, any government that views itself as a net payer is likely to be reluctant to accept a damages scheme, particularly if the scheme is seen as altering the terms of pre-panel settlement and thereby encouraging claims.

Another possibility is to authorize the panel to give a cash award to either side on an equitable basis for its legal costs for the panel proceeding, and the Appellate Body to similarly award costs of the appeal to either side. ICSID tribunals arbitrating investment disputes are empowered to determine who bears the expenses incurred by the parties, the fees and expenses of the tribunal members, and ICSID's charges for the use of the dispute settlement facilities it provides.[132] The complaining party could be awarded its expenses if it completely or overwhelmingly prevails on the merits; similarly, the defending party could be awarded its expenses in the case of a meritless nuisance suit.[133] By raising the amount at stake in a panel ruling, this change

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[130] *See* Bebchuk, *supra* note 107, at 413 (making the same prediction based on a model focused on informational asymmetries). In his model, the greater the amount that depends on a trial's outcome, the greater the likelihood of litigation.

[131] The first proposals for award of damages in the GATT were made by Brazil and Uruguay in the mid-1960s. *See* Committee on Trade and Development, GATT B.I.S.D. (14th Supp.) at 129, 139–40, paras. 41–47 (Apr. 5, 1996). In the ongoing DSU review, the LDC Group and the African Group have proposed awards of monetary compensation to complainants. *See* WTO, *Negotiations on the Dispute Settlement Understanding—Proposal by the African Group*, TN/DS/W/15, at 2–3 (Sept. 25, 2002); WTO, *Text for LDC Proposal on DSU Negotiations—Communication from Haiti*, TN/DS/W/37, at 3 (Jan. 22, 2003).

[132] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 14, 1966, art. 61(2), 17 U.S.T. 1270, 575 U.N.T.S. 159.

[133] *See* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2001). This leading treatise on ICSID arbitration states that ICSID practice on apportioning costs is "neither clear nor uniform." *Id.* at 1225. Rather, Schreuer suggests the following principles: Generally, the parties should split the costs of the arbitration and pay for their own expenses; if a party has completely or overwhelmingly prevailed on the merits, the

would also decrease the probability of settlement before a ruling, but its distributional effects would be more ambiguous, and more salable.

However, for cash awards of any type to be credible enough to alter parties' behavior in bargaining and settlement, they would also need to be guaranteed against blockage. In the United States, for instance, cash payments from the U.S. government to settle claims against it must go through the normal congressional budget and appropriations process, affording many opportunities for blockage. In 2001, the United States and EC reached a creative settlement of the *Section 110* dispute:[134] the EC agreed to accept a cash payment in lieu of compliance for the three years starting December 21, 2001, and the United States agreed to pay $3.3 million to a fund established by EC performing rights societies to assist their members and promote authors' rights.[135] After finally agreeing to appropriate the money in 2003, the Committee on Appropriations of the U.S. House of Representatives put on the record its hostility toward such cash payments to settle trade disputes, and its unwillingness to appropriate any further funds for this purpose.[136] This pre-emptive move may have been primarily targeted

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losing party may have to bear a majority of the arbitration costs and part or all of the winner's expenses; misconduct by a party during the proceedings should be reflected in the award of costs; a party that is responsible for a particular part of the proceeding (e.g., a visit by the arbitrators to the site of an investment) should bear the resulting costs. *Id.* at 1231–32. Rule 28(2) of the ICSID Rules of Procedure for Arbitration Proceedings requires each party to an ICSID arbitration, and the ICSID Secretariat, to submit a statement of costs reasonably borne by it to the tribunal promptly after closure of the proceeding.

[134] WTO, Panel Report, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/R (June 15, 2000) (adopted July 27, 2000).

[135] WTO, *United States-Section 110(5) of the US Copyright Act-Notification of a Mutually Satisfactory Temporary Arrangement*, WT/DS160/23 (June 26, 2003).

[136] *See House Appropriators Reject Cash Settlements for Trade Disputes*, INSIDE U.S. TRADE, Aug. 8, 2003 (citing text from H.R. REP. NO. 108-221, Committee Report on H.R. 2799, the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 2004).

> WTO Fund. The Trade Act of 2002 established a fund for the payment of total or partial settlement of any dispute before the World Trade Organization. No funds have been provided in this or any other Act to capitalize the fund. Public Law 108-11 included a lump-sum payment to the European Communities to cover a three-year period in a music-licensing dispute. However, this was intended as a one-time only appropriation. There is a long-established practice of using suspension of tariff concessions to resolve trade disputes and the Committee does not intend to appropriate funds to settle these matters. The Committee cautions U.S. negotiators that there should be no commitments made within trade agreements to use funds from the U.S. Treasury that have neither been requested nor appropriated to resolve trade disputes.

at the Administration, but it points to a generic problem: if the government in question moves pre-emptively to refuse payment, it will impair the credibility of any cash award against it, with effects back along the decision chain of the parties to a dispute.

The DSU rules could make WTO damage awards of any type credible, by requiring each Member to recognize such awards as binding, and requiring each Member to enforce the pecuniary obligations of such awards as if the award were a final judgment in its domestic courts, including access to the laws regarding execution of judgments. This is the method by which the ICSID Convention guarantees that cash awards made by ICSID tribunals will be paid.[137] The certainty of payment this conveys promotes the substantial settlement rate in ICSID cases. If the WTO adopted this rule, a winning WTO government faced with a defendant who refused to pay could simply levy on the defendant's assets anywhere in the territory of WTO Members. Such a change seems no more likely to please House appropriators, but would make cash awards credible.

Information models of settlement point to asymmetries of information as the cause of failure to settle: one side has less knowledge than the other about the facts and law determining liability and damages and therefore is unable to make an offer that the other side should accept. We have discussed above the practical problems of building a WTO case, and the lack of any organized discovery process during the consultation period before the parties commit themselves to going through panel proceedings. The WTO could reduce asymmetry of information, and promote early settlement, by providing such a discovery process. An example of an information-gathering process already exists, in the procedures for developing information concerning "serious prejudice" in Annex V of the Agreement on Subsidies and Countervailing Measures.[138] Some sort of supervision would have to be provided for this discovery process, to avoid the "discovery wars" of big-stakes U.S. commercial litigation.[139]

William Davey, former director of the WTO Legal Division, argues that "[t]urning the consultation process into a pre-trial discovery mechanism

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Id.

[137] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *supra* note 126, at art. 54.

[138] WTO, Agreement on Subsidies and Countervailing Measures, Annex V, *available at* http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm (discussing procedures utilized in WTO, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/R (July 2, 1998)).

[139] *See* ROBERT H. MNOOKIN & ROBERT WILSON, A THEORY OF EFFICIENT DISCOVERY (John M. Olin Program in Law and Economics, Stanford Law School, Working Paper No. 136, 1996).

would likely undermine chances of settlement, as the process in practice would likely be directed exclusively at preparing for the panel stage of the process, which would promote an adversarial approach."[140] Yet unless a complaining party's objective can only be delivered by panel litigation—as is the case if the objective is the panel or Appellate Body report itself—the parties should be more willing to settle if they have more equal knowledge of how the case will come out.

VII. U.S. SETTLEMENT PROPOSALS

The Trade Act of 2002, which authorized U.S. participation in the Doha Development Agenda negotiations, required the U.S. Department of Commerce, in consultation with other executive branch agencies, to submit a report by the end of 2002 addressing congressional concerns that decisions of WTO panels and the Appellate Body have added to U.S. obligations and diminished U.S. rights in respect of antidumping, countervailing duty and safeguard measures.[141] The concerns expressed relate to the recent string of U.S. losses in dispute settlement regarding U.S. trade remedy measures. The report that Commerce submitted[142] provides a snapshot of U.S. experience with WTO dispute settlement, expresses concern about cases involving U.S. trade remedies, and proposes an executive branch strategy in two parts, led by negotiation in the Doha Round talks. An appendix to the report attaches a U.S.-Chile proposal tabled in the Doha Development Agenda negotiations on dispute settlement, suggesting changes to the DSU with the stated objectives of providing greater Member control over the dispute settlement process and greater flexibility to settle disputes.[143] The proposals, as later elaborated by the United States and Chile,[144] include:

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[140] WILLIAM DAVEY, THE WTO DISPUTE SETTLEMENT MECHANISM 11 (Illinois Public Law and Legal Theory Research Papers Series, Research Paper No. 03-08, 2003), *at* http://ssrn.com/abstract=419943.

[141] Trade Act of 2002, Pub. L. No. 107-210, § 2105(b)(3), 116 Stat. 1016 (codified at 19 U.S.C. § 3805) (timely submission of this report was a condition precedent for the provision of expedited Congressional treatment ("fast track" or "trade promotion authority") for implementing legislation for any agreements reached in the Doha Development Agenda negotiations).

[142] *Executive Branch Strategy Regarding WTO Panels and the Appellate Body*, Report to the Congress Transmitted by the Secretary of Commerce, Dec. 30, 2003, *at* http://www.ita.doc.gov/FinalDec31ReportCorrected.pdf.

[143] *Id.* (attachment *at* http://www.ita.doc.gov/ReporttoCongressAppendix.pdf).

[144] WTO, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding on Improving Flexibility and Member Control in WTO Dispute Settlement—Textual Contribution by Chile and the United States*, TN/DS/W/52 (Mar. 14,

- a right for parties to an appeal to see and comment on a draft of the Appellate Body's report before the Appellate Body finalizes the report;
- a right for the parties to a dispute, if they agree, to delete findings in a panel or Appellate Body report that they believe are not necessary or helpful to resolving a dispute;
- a right for panel or Appellate Body proceedings to be suspended if the parties so agree;
- a right for the DSB to decide by consensus not to adopt a particular finding in a panel or Appellate Body report;
- a requirement that panelists have expertise to examine the matter at issue in the dispute; and
- additional guidance to the Appellate Body and panels on their work.

The United States also continues to advocate that all panel, Appellate Body and arbitration meetings be open for public observation except for portions dealing with confidential information; that all written submissions should be public when submitted and maintained in a central registry; that final reports of panels be immediately available to the public when issued to the parties; and that there be procedures for handling amicus curiae submissions to panels and the Appellate Body.[145]

The U.S.-Chile proposal could make settlements more likely, although not settlements before the parties have invested time and resources in a panel proceeding. At present, settlement during Appellate Body proceedings is unheard of. The sunk costs of the parties are high, and the marginal cost of proceeding low; the compressed timeframe of the process raises the transaction cost of settlement by making it costly to divert resources into settlement talks. The addition of an opportunity for comments would lengthen the proceedings and increase marginal litigation costs, creating some remaining surplus to divide under cooperation. Theory predicts that giving the parties to the case a license to delete particular legal findings—a concept difficult for smaller WTO Members to accept—will reduce lumpiness and therefore the transaction costs of settlement.

Information-based theory tells us that the proposal would create an opportunity for the litigants to talk with maximum knowledge of what the legal outputs of the dispute will be. Bargaining where the shadow of the law is strongest gives each party the best position to make the other side offers that should be in that side's interest to accept. The parties will also be in the best position to sell a compromise solution to those excessively optimistic

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2003).

[145] WTO, *Further Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency*, TN/DS/W/46 (Feb. 11, 2003).

domestic stakeholders who will not accept loss until it stares them in the face. Indeed, the U.S.-Chile proposal, by pointing to the Appellate Body process, implies that the frequency with which the Appellate Body reverses panel reports has created expectations that make it difficult to settle a case before an appeal.[146]

There are two caveats. First, we assume the objective of the proposal is to facilitate settlement in WTO cases involving challenges to trade remedies. Is the objective to allow a country whose trade remedy measure is challenged in the WTO to avoid a panel ruling that would set a precedent generally limiting trade remedy use by reaching a practical settlement with the complaining country? If so, getting to agreement may require the importing country (and the domestic petitioner in the underlying trade remedy action) to be in a position to make a deal, either by adjusting or dropping the trade remedy measure or by providing some other form of compensation that will interest the complaining country and its private stakeholders. If domestic trade remedy laws tie the hands of the importing government and prevent it from making offers that will interest the complaining party, there will be no deal. Second, transparency in dispute settlement may have supervening importance for civil society and for the legitimacy of the WTO, but it also means tradeoffs for settlement of disputes by agreement. The U.S.-Chile proposal would reduce transaction costs for settlement, but increased transparency would increase transaction costs. It is not possible to have it both ways.

VIII. CONCLUSIONS AND SUGGESTIONS

This long discussion should conclude simply, with a list of the practical suggestions above and some notes on a further research agenda on settlement in the WTO. As for the suggestions:

- Provide a supervised discovery process to parties before they commit to the panel process;
- Maintain privacy in the negotiating process, including the rule excluding use of settlement offers in litigation;
- Involve negotiators on the dispute settlement team throughout a case, to avoid losing focus on settlement;
- Expand existing WTO-related legal aid to developing countries to include expert assistance from trade negotiation professionals;

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[146] The proposal is clearly perceived, at least by some, as an attack on the Appellate Body. *See, e.g.*, the comments of former Appellate Body Member Claus-Dieter Ehlermann on this Proposal, *in* Claus-Dieter Ehlermann, *Reflections on the Appellate Body of the WTO*, 6 J. INT'L ECON. L. 695, 707 (2003).

- Make settlement agreements enforceable, thus making it possible for litigants to make (and be paid for) binding commitments regarding which of multiple compliance paths they will choose;
- Consider cash settlements on an ad-hoc basis to address problems.

A research agenda for dispute settlement begins with better empirical data on outcomes in cases. There are many questions of both theoretical and practical interest that could be asked and answered if the data permitted. If cases are characterized as either policy cases or cases brought for stakeholders, what measurable differences exist between them, and how can these differences be rationally explained? How can we distinguish between cases that have been settled and cases that have been abandoned by the complaining party? How does settlement behavior in the WTO compare to other fora such as ICSID or other investor-state disputes under bilateral investment treaties or disputes under regional trade agreements? And as the brief discussion above shows, further work in modeling WTO disputes, or testing models against the features of WTO dispute settlement, can produce insights that are both interesting and practically useful.